Supreme Court, U.S.
FILED

NO. 94 980 NOV 28 1994

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF LOS ANGELES, a
Municipal Corporation and
Public Entity of the State
of California,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Volume I of II

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED

1. Where a plaintiff sues a police officer under 42 U.S.C. 1983 for injuries resulting from the alleged use of excessive force, and sues the employing City for the same underlying incident under a Monell theory of liability, and where summary judgment is granted against the plaintiff respecting the Monell theory but the plaintiff proceeds to trial and obtains judgment on a general verdict against the officer individually which judgment is satisfied; whether the plaintiff may then appeal from the Monell Summary Judgment determination and upon reversal be entitled to proceed to trial again on the Monell theory on the basis of the same underlying incident

as was tried against the officer individually.

2. Whether the Los Angeles Police Department employment of canine resources shown by the facts of this case implicates Monell liability.

PARTIES TO THE PROCEEDINGS

Petitioner City of Los Angeles, a Municipal Corporation and Public Entity of the State of California was Defendant-Appellee in the court below. Thane Carl Chew was Plaintiff-Appellant in the court below. Although the Court of Appeal opinion also addressed the liability of Daryl Gates, Donald Yarnall, Mark Mooring and Patrick McKinley, these individuals were found

by a majority the Court of Appeals panel, to be within the purview of the qualified immunity, and are not before this Court. Daniel Bunch was a defendant below. His case is final and he was not a party before the Ninth Circuit Court of Appeals below.

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No._____

IN THE
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October Term, 1993

CITY OF LOS ANGLES, a Municipal Corporation and Public Entity of the State of California

Petitioner

vs.

THANE CARL CHEW,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner City of Los Angeles, a Municipal Corporation and Public Entity of the State of California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed

in this case on June 27, 1994. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit was denied by that court on August 30, 1994.

OPINION BELOW

This action produced three separate opinions from the Court of Appeals. The initial opinion is by Judge Reinhardt, with separate partial concurrences and partial dissents by Judge Norris and Trott. The Court of Appeals opinion was handed down on June 27, 1994, and is reported at 27 F.3d 1432. The opinion was issued by the Ninth Circuit in two volumes. Volume One of the opinion of the Court is attached hereto as Appendix A. Volume

Two of the opinion of the Court is attached hereto as Appendix B.

JURISDICTION

Petitioner was a Defendant-Appellee in this case in the Ninth Circuit below. The opinion and the judgment was entered on June 27, 1994. Pursuant to Rule 40 and Rule 35 of the Federal Rules of Appellate Procedure, petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on July 11, 1994. The Petition for Rehearing was denied and the Suggestion for Rehearing En Banc was rejected on August 30, 1994. This petition is timely filed within ninety days of that date (28 U.S.C.2101(c)). The Order Denying Rehearing is set forth in Appendix C. By its decision

in this case the Ninth Circuit has reversed a Summary Judgment determination in which the United States District Court for the Central District of California had concluded that the City of Los Angeles' determination to employ police dogs to apprehend hiding suspects in built up areas, by seizing and biting if necessary, did not implicate the City's Monell liability. This court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States Amendment 4, Appendix D-1
2. The Civil Rights Act of 1871 (42 U.S.C. 1983) Appendix D-1

STATEMENT OF THE CASE

This case arose out of a lengthy search for a suspect who had fled from the police into a scrapyard in Los Angeles in 110 degree heat on September 4, 1988--the hottest day of that year.

The record in this action upon which the Court of Appeals wrote its lengthy opinion, is somewhat limited. While this appeal was taken from the grant of a Summary Judgment motion which determined that the use of dogs by the Los Angeles Police Department demonstrated in the depositions in the action, did not implicate the City's Monell liability--the plaintiff nevertheless proceeded to trial against the involved individual officer and

obtained a judgment against him. That judgment was satisfied by the City of Los Angeles pursuant to California state law. Appellant, however, chose to appeal this action without the benefit of a trial transcript though the docket of the case reflected that the trial consumed four days (Dkt. No. 58-62). It appears the Court of Appeal record consisted of the depositions which had been before the District Court on the Summary Judgment Motion. (Dkt No. 10, 18, 20 and 24).

CHEW DEPOSITION

The deposition testimony of the plaintiff Thane Carl Chew reflected that he was detained for a traffic violation and was directed to wait at

the curb. While the officer was walking to the police car with Chew's drivers license, Chew fled.

Mr. Chew testified that on September 4, 1988 as he was driving on San Fernando Road his brakes went out, (Deposition of Thane Carl Chew taken December 5, 1988, p. 45) He coasted through a stoplight making a right turn and coasted to a stop. (Id. p. 46) A police car pulled up behind him. (Chew Deposition, p. 47) The officer asked for Chew's drivers license. After Chew presented his license to the officer (Id. pp. 48-49) Chew went over and stood on the curb while the officer walked to the police car. (Chew Deposition, pp. 51-52) Chew testified that at this point he remembered

getting scared because he had a warrant for burglary. (Chew, p. 52; p. 55) He was also aware of his failure to appear for that burglary charge. (Id. p. 55) He stood on the curb a couple of seconds while the officer went back to the police car. Mr. Chew testified that he then panicked because of the warrant and took off running. (Chew Deposition, p. 55) He did not remember the officer ever frisking him at any time before he took off running. (Id. p. 56) He ran for a distance until he reached a scrapyard. (Id. p. 56) Mr. Chew ran and then proceeded to climb a fence, ran a distance again and jumped another fence and saw a police car. He then ran again and jumped two more fences. From the scrapyard he was in,

he saw what appeared to be a black and white police car driving north on a street outside. (Chew Deposition, pp. 58-59) He saw two officers as he was trying to exit and believed the officers saw him. (Chew Deposition, p. 60) He jumped back into the scrapyard and ran again. (Chew Deposition, p. 60) Chew heard what appeared to be a helicopter but could not see it. (Chew Deposition, p. 70) He saw some scrap metal bins and proceeded to hide himself by squeezing in between what appeared to be two stacks of dumpsters. (Chew Deposition, pp. 70-73) He was squeezed in a squatting position between the dumpsters and stayed at this point for around two hours. (Chew Deposition, p. 74) Chew indicated that

he heard an officer say "Go north boy. Go north". He indicated he heard this about a half minute before seeing what he believed to be a police dog. (Chew Deposition, pp. 85-86) From the time he heard the statement, "Go north boy" until the time he saw the dog he did not do anything to surrender himself. After he saw the dog he stated "Call the dog. I'm coming out. Call the dog" After stating this he heard a voice saying "Get em boy". The dog proceeded toward him. (Chew Deposition, pp. 89-90) Chew testified the dog came up to him, opened its mouth and grabbed hold of his left side around his left hip. (Chew Deposition, p. 94) He was squatting motionless and made no move other than move his head.

(Id. p. 96) Chew testified that the dog seemed to be trying to pull him out, grabbing him by the left side. (Chew Deposition, p. 98) As the dog pulled Chew started falling toward the ground. He reached out with his left arm to stop himself. He testified the dog then bit him on his bicep. (Chew Deposition, p. 99) He indicated he did nothing to try to defend himself or try to get the dog off. (Chew Deposition, pp. 99-100) He stated the dog was biting him for one or two minutes. (Chew Deposition, p. 105) He heard commotion as of someone walking through the rubbish. (Chew Deposition, p. 103) He was approximately four to ten feet from the dumpsters and was laying on the ground. He noticed a police

officer. (Chew Deposition, pp. 107-108) He indicated the first thing he saw was what appeared to be a foot coming toward his head. (Chew Deposition, p. 108) He stated he had nothing in either his right or left hand and did not try to strike at the dog. (Chew Deposition, p. 109) He saw the officer after the officer's boot struck his forehead. (Chew Deposition, p. 110) He did not recall whether it was Officer Bunch because he did not get a good look at the officer. (Chew Deposition, p. 110)

BUNCH DEPOSITION

Officer Bunch testified he was summoned to the scrapyard where Chew was hiding at noon on the hottest day

of the year. It was 110 plus degrees. (Deposition of Daniel Bunch taken March 6, 1990, page 92) There were two other dogs looking for Mr. Chew. Bunch and his dog "Volker" had been out in the junkyard about 1/2 hour. (Bunch Deposition, p. 95) Officer Bunch indicated that if given an order to search that Volker would not necessarily in every instance, bite when he found a suspect. (Bunch Deposition, p. 100) In the instant case he had ordered the dog to search. He did not give any intervening order when Chew was found. (Id. pp. 102-103) As he came upon Chew, Chew was hitting the dog on its head and back with a metal pipe (Id. 89, 102-104, 110) Volker had Chew's other arm.

(Id., p. 111) Officer Bunch had not seen the dog when it initially bit the plaintiff. (Id. p. 125) When Officer Bunch saw Chew beating on Volker he yelled at Chew to stop hitting him. (Id. p. 132) It appeared to Bunch at this time that the dog was trying to back up and was attempting to dodge the blows. (Id. p. 134) Bunch lowered himself down between the dumpster where Chew was situated and attempted to kick the pole out of Chew's hand. (Id. pp. 134-35) He kicked several times before he was eventually able to kick it out of Chew's hand. (Id., pp. 136, 152-53) Bunch did not think he kicked Chew in the head in this process, but he didn't have a clear recollection of it. (Id., pp. 136-37) Bunch testified he

couldn't say with any certainty that he hadn't kicked Chew in the head, but he indicated this was not his intent. (Bunch Deposition, p. 137) Once Chew dropped the pole, Bunch indicated that he "downed" Volker, that is he had the dog release the suspect, back up and get down. (Id. p. 138) Bunch testified that Chew never said anything like, "Call off your dog". In fact Chew didn't say anything until Bunch kicked the pole out of his hand. Bunch testified Chew's full attention was on beating the dog. (Bunch Deposition, p. 146)

While the testimony of Chew and Bunch addressed the incident itself out of which Bunch's liability ultimately arose, the plaintiff had also named

other defendants: Police Chief Daryl Gates, Police Captain Patrick McKinley, and Police Sergeants Donald Yarnall and Mark Mooring, as well as the City of Los Angeles.

GATES DEPOSITION

Daryl Gates was Chief of Police at the time. Chief Gates testified that the Los Angeles Police Department used dogs in very complex searches for those suspected of crime in large buildings and large areas. He testified that it takes substantial officer resources to cover such areas. (May 18, 1990 Deposition of Daryl Gates, pp. 11-12) Gates testified that the City's K-9 program originally began as a pilot project. Before implementing a K-9

program the City wanted to be certain this was a safe operation. He testified "We were concerned about officer safety, dog safety and suspect safety . . . and the general public's safety. (Gates Deposition, p. 15) Chief Gates indicated he was involved at this stage in discussions governing the use of dogs. There was a conscious decision not to use dogs in crowd control. (Id., p. 12) The original pilot project involving the use of dogs had gone very successfully. Based upon the report at the end of the project, Chief Gates determined to go ahead with the program as a regular project. (Id., p. 19) Chief Gates testified that policy for the Los Angeles Police Department was established by himself

and the Los Angeles Police Commission. (Gates Deposition, pp. 36-38) Each month the Chief of Police reported to the Police Commission, often including particularly noteworthy incidents where dogs were used. (Gates Deposition, p. 23) Policy regarding the use of Police Department dogs was contained in Special Order 3 included as Exhibit 7 to the deposition of Chief Gates. (Id., Gates Deposition, pp. 27-30) This Special Order read in part as follows:

> "Police dogs are a multi-functional asset of the Los Angeles Police Department. Police dogs may be used in appropriate circumstances to assist officers in the search

> for criminal suspects; the detection and location of narcotics and/or explosives; and the location of missing adults or juveniles."
>
> The order went on to provide: "When a police dog is deployed, the dog handler shall be solely responsible for the control and direction of the dog." (Special Order No. 3, inter alia, Exhibit 7 to the Gates Deposition)

Chief Gates testified that a police dog does not necessarily bite a suspect every time it is out of sight of the handler and finds the suspect. (Gates Deposition, pp. 42, 44) He also indicated that such a dog would not necessarily bite a motionless suspect.

(Gates Deposition, pp. 48-50) He indicated that the policy in employing the use of dogs underscored close control. For example, he testified: "Well, right from the beginning, the people involved in the pilot program stressed close control." (Gates Deposition, pp. 20-21) Chief Gates testified that the reaction to a police dog "Call off your dog" was a normal reaction. (Id., p. 53)

YARNALL DEPOSITION

Other than Chief Gates there appeared to be no other individuals implicated in the lawsuit who could truly be claimed to be City policy makers. One of the individual defendants was a person of long

experience in dog handling and dog training who had been with the K-9 program from its very inception. Donn A. Yarnall had been a police officer for 19 years at the time his deposition was taken. (Deposition of Donn Yarnall, taken June 14, 1990, p. 3) Yarnall had been with the dog program for a substantial period before October of 1988. He had been promoted to a patrol sergeant at that time and indicated the promotion ended his "dog career". (Yarnall Deposition, p. 89) Yarnall's experience in dog handling was extensive and went back more than 15 years. (Id. p. 15) In Yarnall's many years of experience he testified that if a suspect attempted to flee or fight, the dog was used to control the

suspect. Control was maintained if a suspect sought to fight or flee, by biting. (Yarnall Deposition, p. 19) Yarnall testified that from the beginning of his career in dog handling, however, if the suspect offered no resistance, the trainer would call the dog back. The handler was trained to stay within the sight of the dog. If it looked as though the dog was getting out of sight the handler would recall the dog. (Id., p. 19, p. 25)

Yarnall testified that a dog's decision to bite an individual could not be generalized. The dog would usually bite what was moving, whether it was an arm or a leg. If the suspect was hitting the dog with his arm, the

dog would usually transfer the bite to the arm. (Id., p. 36)

Sgt. Yarnall testified that the entire concept of the K-9 unit started out as an experimental program. (Yarnall Deposition, p. 50-51) The search dog program also started out as an experimental program. The program envisioned that the dog and trainer would be together night and day and would travel to a particular location in the City when called. (Id., p. 41) Yarnall had also conducted the training of various narcotic detection dogs in 1977 or 78. (Id., pp. 42, 44)

Sgt. Yarnall testified that the program's inception was during the "post-proposition 13 era" and one of the factors mentioned in the proposal

was that a dog could search much more efficiently, much faster and with greater safety than a human being. (Yarnall Deposition, pp. 51-52) In this new program the dog handler worked closely with the dog and would call the dog back when it got out of sight of the handler. (Yarnall Deposition, p. 56) Sgt. Yarnall indicated that suspects who did not resist were not bitten (Id., pp. 57-59) However, every situation was different (Id., p. 67)

Yarnall described the qualities he looked for in a patrol dog. He stated that a patrol dog must be temperamentally sound, show no fear, and be confident within himself. He must like people and not be quick to

bite or protect himself. The patrol dog must not be fearful or afraid of noises. Yarnall indicated there should also be a pronounced hunting or pack drive - that is the dog must have the ability to be channeled, commanded and obedience trained. (Yarnall Deposition, p. 75)

Sgt. Yarnall had developed the initial training manual for the K-9 unit during the early 1980's. (Yarnall Deposition, pp. 82-83) The K-9 unit had been a big success within the Department and Yarnall felt the manual would provide guidelines as well as an information resource for handlers. The manual also standardized the certification process. (Id., p. 83) He testified, the certification process

which a dog would have to go through, was without question the most difficult certification in the Country. (Id., p. 84) The best handlers were sought to be put together with the best dogs. Handlers had to pass an oral board and a background examination. A person would be disqualified if the person had a history of excessive force or personnel complaints. The oral examination sought to separate out individuals to be handlers who had maturity and emotional stability. (Id., pp. 86-88) Both the dog and trainer were trained together. Sgt. Yarnall indicated he had trained the dog in this case "Volker" and he had also trained Officer Bunch. (Yarnall Deposition, p. 97-98)

Sgt. Yarnall testified that the Police Department works very hard with the community to show them that, under normal circumstances, the dogs will not bite them. The dogs were often taken to grammar schools "With hundreds of kids petting them and climbing on then." On the other hand he indicated "I think it's common knowledge we have had police dogs in this Country from 30-40 years now. And I think you don't have to be an expert on the subject to know that if you run from a police dog, he'll bite you. That's normal." (Id., p. 93)

Sgt. Yarnall testified that the "find and bark" technique in dog handling was abandoned in 1987 or 1988 because the handler was not as readily

able to maintain control of the dog in this circumstances. This difficulty in maintaining control occurred because the handler would have to go up to the dog and yank on the collar and in doing so, expose himself to a felony suspect. As a safety factor Yarnall testified the find and bark technique was eliminated. (Id., p. 94) Yarnall indicated it would be against training to order a dog to get a suspect who was not armed and who had given up. (Id., p. 101) On the other hand, Yarnall testified that an officer must also assume for the sake of his own safety, that each suspect he is searching for is armed. If you do not make such an this assumption, Yarnall intimated, you will get yourself killed (Id., p. 102)

Yarnall testified that if a suspect says "I give up; Call off your dog", the handler has the option to either "down" his dog at the position he is at, or recall the dog. (Id., pp. 104-105) The substance of Yarnall's testimony was that this all depended on the specific situation. (Id., pp. 105-106)

MOORING DEPOSITION

Mark Mooring was a police officer for the City of Los Angeles who held the rank of Sergeant. In 1989 he had been assigned to the K-9 unit for about nine years. (Deposition of Mark Mooring, taken Wednesday, March 21, 1991, pp. 3-4) Mooring, similarly to Sgt. Yarnall, was not a City policy

maker. (Id., p. 71) Mooring testified that the City had used K-9s since 1980. (Mooring Deposition, p. 6, p. 15) He testified that Chief Gates was the highest member in the police department who approved the use of K-9s by the Department. (Id., pp. 10, 15, 16) Sgt. Mooring testified that the City maintained a manual for the handling of K-9s. (Id., pp. 8-9, 52-54) He stated there were many reasons for the use of K-9s including the officer safety factor when searching for felons as well as the success of ferreting out a concealed suspect by using the dog's sense of smell. (Id., p. 14) Mooring testified that the dogs were trained to sniff out suspects, to jump over or climb over obstacles, and to obey

specific commands. If necessary the dogs were trained to bite and hold a suspect until told to release, however in general, they were not trained to bite and re-bite. It was the trainer rather than the dog who made these decisions. (Id., pp. 41-43)

Mooring had attended several training seminars and had spent tine with other trainers. (Id., pp. 32-33) Mooring testified that it was not a fair statement that in every case a dog should find someone on a search, and bite the person. The handler in all situations was required to maintain the control of the dog, so that such a person would not be bitten. (Id., p. 47) He also testified that the handler was not supposed to let the dog out of

his sight. (Id., pp. 63-64)

Sgt. Mooring testified to a canine tactic earlier employed where the dog would find a suspect and the dog would bark as long as the suspect did not move. (Id., pp. 48, 61-62) He indicated that there had been changes in the manual with respect to this tactic, sometime in 1989 or 1988 (Id., pp. 61-62) He indicated there was an emphasis upon putting the responsibility upon the handler to remain much closer to the dogs. (Id., pp. 63-64)

Sgt. Mooring indicated that a State law, California Civil Code Section 3342, provided than an officer would not be liable for the proper use of the police dog. (Id., p. 70) He

indicated that the Department kept statistics to monitor the percentage of time a dog would bite a suspect. The Department employed this information as a "weather vane" to assure that any particular dog handler officer was not abusing his power. (Mooring Deposition, pp. 73-76)

McKINLEY DEPOSITION

Patrick McKinley testified that he was a Captain in the Los Angeles Police Department. He was the commanding officer of the Metropolitan Division. (Deposition of Patrick McKinley, taken March 29, 1990, p. 3) Captain McKinley was not a policy maker for the City. He indicated that policy could only be made by the Chief of Police and the

Board of Police Commissioners. McKinley testified that within his Metropolitan Division there were a number of different units including the K-9 units, a SWAT unit, an equestrian unit and a crime task force. (McKinley Deposition, p. 8) At the time the K-9 unit evolved, McKinley testified, it had been introduced without the approval of the Police Commission. However, K-9 matters had recently been placed into the Police Department manual effective March 30, 1990 as a special order of the Chief of Police. (McKinley Deposition, pp. 10-11) McKinley testified the order had gone before the Board of Police Commissioners about two weeks earlier. (Id., p. 12)

McKinley testified that the K-9 program began as a trial program. The program proved effective and was eventually assigned to the Metropolitan Division. (McKinley Deposition, pp. 12-13) The Police Planning and Research Division wrote up the special order for the Chief's signature. (Id., pp. 13-14) When McKinley became Commander in 1988, there already were records kept of the number searches made using dogs, the number of suspects found and the number of bites per suspect. (Id., p. 29) These records had been computerized. (Id., p. 30) Captain McKinley indicated that the dog training procedures had been evolving at the time he became commander. (Id., p. 35) He testified that he had

discussed with Sergeant Mooring what he would term a "philosophical difference" between what was termed "find and bark" and "handler control." There was a concern in the department about the number of use of force incidents - not that dogs were involved in, but the handlers themselves. McKinley indicated that he and Sergeant Mooring discussed these issues, and out of these discussions came the point that for the safety of everyone - both the suspect, the dog and the community - it was necessary for the handler to be "on the point" - that is very close to the animal. McKinley narrated that the only way the handler could do this was to be close to the animal and this is why he called this "handler control."

(Id., p. 36) McKinley testified:

> "So, in my evaluation of it, I determined that what I'm -- in a find and bark policy, we are depending on an aggressive animal to respond to training that we can't be sure of; that no one can be sure of. Therefore, I agreed with Sergeant Mooring and the experts that it's . . . "And from what I have seen of the dogs, when they're hunting -- when they're seeking, the only thing that they will respond to, over their natural instincts to fight and to hunt, is the commands of their handler. And it's

extremely important that that handler has control over the dog and the handler has -- has, as much as possible, a close proximity to the dog. . . "Now, that puts our handler in a -- in a danger -- much more dangerous position. But because of the concerns I have for both community and every one involved, I think that's the safer -- safer method. I don't think, from what was explained to me, that you can depend on an animal to always respond to the training as -- as it would be given to him." (McKinley Deposition,

pp. 38-39)

While McKinley indicated that it was desirable that the handler be close to the dog at all times, he indicated that if a handler did lose sight of the dog, if the suspect remained still and did not get aggressive, but just stood still, the dogs were trained not to be aggressive or bite. However, McKinley cautioned that they cannot always guarantee this. (McKinley Deposition, p. 41) He continued however ". . . it's my opinion that, in the majority of instances with -- almost universally with our dogs -- if that suspect just remained still, the dog won't bite, and the handler has the, generally speaking, the time when the handler doesn't have direct eye contact with

the dog is very, very, ah, momentary -- perhaps for lack, of a better term. As I've seen our boys as they work, they really try to stay in close proximity to their dogs." (McKinley Deposition, pp. 41-42) McKinley reiterated that it was "incredibly necessary that we go to a handler control situation where the handler was with the dog and the dog was under the control of the handler because find and bark -- find and stand -- whatever one wants to call it -- cannot be guaranteed." (Id., p. 45) McKinley emphasized that it was necessary for the handler to be there when the dog was hunting for a person because it could not be guaranteed without the handler there that the dog would not

harm the person. (Id., p. 46) He indicated while City liability may have been mentioned in the course of his discussions with Sergeant Mooring, liability was really a moot issue as they were simply trying to do the right thing . . . "we do what we think is right." (Id., p. 49)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

There are two essential reasons why this Court should grant certiorari in this case. The first reason addresses the use of canine resources by police departments--an area which cries out for a rule of national uniformity in light of the patent conflict this decision creates with the

6th Circuit decision in Robinette v. Barnes. 854 F.2d 909 (6th Cir. 1988) Even without the clash of the Circuits, however, canine resources are simply too important to the preservation of the lives of police officers and pursued suspects to not review a decision like this one which directly implicates virtually every police canine program in the country under Monell. If Los Angeles' program can't pass muster, given the consideration which went into it, most other canine programs will fall. This issue has wide ramifications and is clearly a question of overriding National importance. The stakes inherent in such an issue are enormous, and lives could literally hang in the balance.

The second reason why this Court should grant certiorari lies in the fact that Thane Carl Chew, the plaintiff and appellant, has already has his day in Court, has already obtained a judgment, and has already had the judgment satisfied. The trial court's charge to the jury required that in the event the jury found the defendant liable it should compensate the plaintiff for all damages which he had incurred. (Dkt. No. 68) While the plaintiff was the only party in the action who could have known for sure that he would be appealing, he never sought any clarification of the basis for liability in the District Court. He simply obtained his judgment and then went on without explanation to

raise the Monell issue in the Court of Appeals. The decision of the Court of Appeals indicates that the $13,000 damages judgment which Chew received may have been for a kick in the head by Bunch rather than the bites by Volker. While petitioner feels such a conclusion defies common sense, given the complexion of this case, it also unfairly places the burden of showing which injuries were being compensated, upon the defendants, who had no ability to know or control whether or not Chew would appeal. The entire transaction in this matter took place in a very abbreviated time period and it can only be concluded that the jury ultimately awarded damages on the entire case before it and not some isolated

movement by Officer Bunch as painted by the Court of Appeals.

I

THE EXTENSIVE TRAINING PROVIDED THROUGH L.A.P.D.'S CANINE PROGRAM SHOWN BY THE RECORD IN THIS MATTER COULD NOT POSSIBLY IMPLICATE MONELL LIABILITY ON THE PART OF THE CITY OF LOS ANGELES

The past few decades have witnessed an unprecedented rise in the use by police agencies of police dogs to assist officers in finding concealed suspects in built-up obscure or otherwise difficult areas. These animals' remarkable sense of smell will easily find hiding suspects in concealed places, in buildings and in

built-up areas with far greater efficiency than unaided police officers and at the same time reduce the risk of a direct police-suspect confrontation. This obvious benefit inherent in the use of canine resources in searches for suspects in built-up areas is well recognized and has been adopted in a substantial number of police departments throughout the United States. The benefits of these canine resources was best expressed in Robinette v. Barnes, 854 F.2d 919 (6th Cir. 1988)

> "Indeed, instead of generally causing deadly force to be used to apprehend criminals, we believe that these dogs often can help prevent

officers from having to resort to, or be subjected to, such force. . . . The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect. . . We are not persuaded by the evidence presented that the remote possibility that the use of a police dog to apprehend a felony might, under extraordinary circumstances, cause death, outweighs the

dog's proven benefits for effective law enforcement." (Robinette v. Barnes, 854 F.2d 902, 914)

The opinions of the majority[1] appear to reject this holding in Robinette v. Barnes, which until now was the seminal Section 1983 canine case. The majority's holding in the instant action concludes that the use of police dogs to find and seize, suspects by biting if necessary, should be tried to a jury and may give rise to

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[1]For the purposes of this Petition, the majority refers to the opinions concluding to reverse the Summary Judgment determination as to the City of Los Angeles which were written by Judge Reinhardt and Judge Norris.

Monell liability. The posture of the 9th Circuit stands in a dramatic opposition to that of the 6th Circuit which has been widely regarded as the law on this subject.

A substantial part of the decision of the majority seems premised upon the conclusion that the officer's release of the dog, given the training of the dogs and their handlers may give rise to liability under Monell. A few years ago, this Court in City of Canton v. Harris, 489 U.S. 378, 391-92 (1989) concluded that a deficient training program evincing deliberate indifference where that inadequate training is the moving force causing the constitutional violation may implicate Monell liability. The record

in this action, however, belies the suggestion of inadequate training. In fact, the training was substantial and involved a standardized certification process. Both the dog and the trainer were trained together. (Deposition of Yarnall, pp. 97-98) The best handlers were sought out to be combined with the best dogs. The handlers went through a background examination and were disqualified if any had a history of excessive force or personnel complaints. The handlers had to pass an oral board designed to call out only persons with a substantial maturity and emotional stability to become dog handlers. (Id., pp. 86-88)

Los Angeles had promulgated an extensive canine manual which provided

guidelines and information. The program even provided for a standardized certification process for the dogs. (Id., p. 83) Sergeant Yarnall had concluded that this certification process was the most difficult in the country. The evidence produced on the dog training and handler training was largely unrebutted. The evidence hardly reflects a municipal policy of deliberate indifference in the training of either the dog or the handler, yet the majority glosses over many of these details, and simply concludes that the case should be retried under Monell. Given the protracted training to which both the dog and handler were exposed in the City's program, it is very

likely that if the City of Los Angeles canine program should implicate potential Monell liability, there would be few programs utilizing dogs in other cities which could possibly survive. However, the greater vice here lies in the insidious reality that in challenging the constitutionality of the use of police dogs we are ultimately weighing the possibility a suspect may be bitten against the possibility of loss of life. Given the very substantial stakes which are at issue, this case entreats this Court to grant certiorari so that the use of police dogs may continue to save the lives of police officers and the suspects whom they pursue, and not become a National legal battleground

for Monell liability of America's police departments.

II

THIS COURT SHOULD EXAMINE THE QUESTION OF WHETHER A PLAINTIFF WHO HAS ALREADY BEEN THE PRESUMED RECIPIENT OF A JUDGMENT FOR ALL DAMAGES UNDER SECTION 1983, SHOULD BE ACCORDED ANOTHER TRIAL ON THE ISSUE OF MONELL LIABILITY.

The issue of whether or not Chew should be accorded a second trial after receiving a judgment and obtaining satisfaction of that judgment, is one which implicates a very sound common sense doctrine. There was only one controversy here and that was in the release of the dog and the short span

of events which ensued thereafter. The entire incident erupted with the release of the dog and the trial court explicitedly instructed the jury, in the event that it found the defendant liable, to compensate the plaintiff for all damage which he had incurred. (Dkt No. 68) The jury rendered a verdict in favor of the plaintiff for $13,000.00 and that judgment was satisfied by the City of Los Angeles. (Dkt. Nos. 72, 73, 74, 84) The Court of Appeals' opinion concludes that it cannot be discerned whether the jury awarded damages for the dog bites or for the kick which Chew alleged he sustained: ". . . "while on the basis of the record before us, it appears that the jury may have compensated Chew for

Volker's bites, we cannot say with any assurance that it did so." This appears to ignore the fact that the dog was the central focus of this entire matter and it was the release of the dog which brought about the causal forces which resulted in all of the things which followed. Only one individual cause of action was alleged, and it is doubtful that the jury isolated out the dollar value of a kick from the dollar value of a bite in the fray which followed the release of the dog. This entire matter culminated in a single event in which Volker bit Chew and Bunch admitted he may have kicked him in the head. More importantly, however, this Court must determine when and under what circumstances a

potential Monell cause of action will be barred by the satisfaction of the judgment in the underlying individual Section 1983 action.

Defendant contends that it is a judicial waste to now proceed on a Monell theory of causality after the City has paid the judgment. This position, however arises from a controversial District Court opinion emanating out of the Central District of California to which the Court of Appeal opinion does not truly allude. The case was extensively cited in the briefs below. In Sanchez v. City of Riverside, 596 F.Supp. 193, 195 (C.D. CA 1984), the District Court for the Central District of California held that once a municipality agreed under

state law that it was obligated to pay the judgment against its employee defendant, the plaintiff could not thereafter proceed against such a city under a Monell theory. The Sanchez Court concluded this on the basis of mootness or the lack of in Article III "case and controversies" jurisdiction. The Court concluded that, because in such an event, the Monell prosecution would be a method of simply showing the same ultimate liability was caused through a somewhat different theory of causality. This purpose sought no more than an advisory adjudication against the City. While the reasoning which the District Judge in Sanchez set out with such clarity, has often been ignored by other courts and circuits,

it needs to be addressed in a case of national application such as this one. The District Court's reasoning in Sanchez was simple.

> "Monell, of course, does not create a separate class of constitutional wrongs; it merely provides that under certain circumstance a municipality may, itself, be held liable as a 'person' for deprivation of a constitutional right, (citation), as well as the individual perpetrator of the wrong. Since all compensable damages resulting from the constitutional wrong to plaintiff Sanchez have been

assessed and the City has agreed to pay the judgment, nothing further remains to be adjudicated." (Sanchez, at 195)

This Court needs to examine this proposition if for no other reasons than that of the potential repeated expenditure of judicial resources addressing essentially the same underlying facts. However, there are also important questions in the fairness of a case in which the appellant who never obtained a special verdict and never ordered up a transcript of the trial proceedings, is not given the burden of establishing the basis of his own judgment. To

place the burden of showing exactly how such a jury determination was produced upon the appellee, is to violate a rule of convenience in which only the appellant truly knows whether or not an appeal may ultimately ensue from these determinations. This Court needs to better examine all of the policies implicated in this issue.

III

CONCLUSION

For all of the foregoing reasons, this Court should issue a Writ of

Certiorari to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit.

DATED: November 22, 1994

Respectfully submitted,

JAMES K. HAHN, City Attorney
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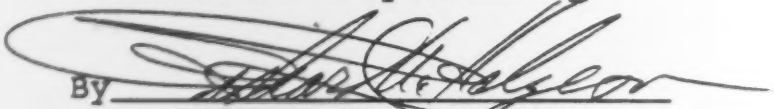
By 
RICHARD M. HELGESON
Assistant City Attorney

CHEW v. GATES APPENDIX A

OPINION VOLUME 1

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THANE CARL CHEW,

Plaintiff-Appellant,

No. 91-55718

v.

D.C. No.
CV-89-5204-RG(Tx)

DARYL GATES, individually as Chief of Los Angeles Police Department; City of Los Angeles, a Municipal Corporation and Public Entity of the State of California; and DANIEL BUNCH; DONALD YARNALL; MARK MOORING; PATRICK McKINLEY; and DOES 1 through 10, 14, 16 through 20, inclusive, each individually and as a Los Angeles Police Officer,

OPINION

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California

Richard A. Gadbois, Jr., District Judge Presiding

Argued and Submitted
August 18, 1992 - Pasadena, California

Filed June 27, 1994

Before: WILLIAM A. NORRIS, STEPHEN REINHARDT AND STEPHEN S. TROTT, Circuit Judge

Opinion by Judge Reinhardt; Partial Concurrences and Partial Dissents by Judges Norris and Trott

SUMMARY

**Individual Rights Civil Rights
Constitutional Rights**

The court of appeals affirmed in part a district court judgment, reversed in part, and remanded. The court held that the district court erred in holding that a police department's policy governing the use of dogs to seize fleeing or hiding suspects was constitutional.

An officer of appellee City of Los Angeles' Police Department stopped appellant Thane Chew for a traffic violation. Chew fled from the officer and hid in a scrapyard. After the officer discovered that there were outstanding warrants for Chew's arrest, canine units were called in to search for Chew. Officer Daniel Bunch and his

charge, police dog Volker, were dispatched to assist in the search. Bunch unleased Volker, and approximately two hours after Chew had fled to the yard, Volker found him crouching between two metal bins. At the time, Bunch was not in sight of Volker. Bunch did not immediately accede to Chew' request to call off the dog. Volker bit Chew several times and then seized him. Chew sustained injuries. Bunch admitted kicking at Chew in an attempt to disarm him and to protect Volker.

Chew brought a civil rights action against the City, Bunch, and various other members of the Department, alleging violations of his Fourth and Fourteenth Amendment rights. Chew

claimed that Bunch violated his right not to be subjected to excessive force by unreasonably releasing Volker, and that Bunch's action was caused by a City policy, custom, or usage. Chew also claimed that, regardless of the reasonableness of Bunch's action in releasing the dog, the City's policy of training police dogs such as Volker to apprehend unarmed and non-resistant suspects by biting, mauling, and seizing them was itself unreasonable and unconstitutional.

The district court granted summary judgment in favor of the individual defendants other than Bunch (other defendants) on the ground of qualified immunity, and in favor of the City on the ground that Chew failed to

demonstrate that a City policy unlawfully caused his injuries. The court held that the Department's policy governing the use of dogs was constitutional. A jury rendered a verdict in Chew's favor against Bunch, and the City paid the judgment on Bunch's behalf.

Chew appealed the district court's grant of summary judgment.

[1] Chew's claims against the other defendants were not moot. the three constitutional violations alleged against Bunch were different from the constitutional wrongs that they allegedly committed. [2] In addition, Chew could recover actual damages from the other defendants.

[3] The satisfaction of the

judgment against Bunch did not bar Chew from pursuing his claims for actual damages for his dog-bite injuries against the remaining defendants.

[4] The district judge erred in finding as a matter of law that Bunch's decision to release Volker was reasonable. [5] A rational jury was not required to decide that using Volker to apprehend Chew was reasonable. [6] The force used to arrest Chew was severe, [7] and Bunch had good reason to expect that Chew might be mauled when he released Volker. [8] In addition, the record did not reveal an articuable basis for believing that Chew was armed or that he posed an immediate threat to anyone's safety. [9] Under all of the

circumstances, the question of the reasonableness of the decision to use the force involved, whether or not "deadly," to seize Chew had to be submitted to a jury. The record did not render reasonable as a matter of law the considered judgment to unleash a German Shepherd trained to seize suspects by "biting hard and holding," by mauling and sometimes seriously injuring them. [10] The question whether it was reasonable under the Fourth Amendment for Bunch to release Volker was for the jury.

[11] There was little doubt that a trier of fact could find that Chew's injury was caused by City policy. In the district court, the City conceded, for purposes of summary judgment, the

truth of Chew's contention that Department policy authorized seizure of all concealed suspects by dogs trained to bite hard and hold. Accordingly, the district court's grant of summary judgment in favor of the City had to be reversed.

[12] There was a genuine issue of material fact as to whether the other individual defendants authorized, approved, or acquiesced in the canine force policy. [13] However, the district court's grant of summary judgment in favor of the individual defendants other than Bunch on the ground of qualified immunity was proper. [14] At the time of Volker's assault, there was no clearly established law prohibiting the use of

dogs in the manner permitted by the Department's policy.

Circuit Judge Norris concurred in part and dissented in part, stating that whether the police dogs, trained by the Department to bite and hold, were instruments of deadly force was an issue of fact that could not be resolved on the summary judgment record. In addition, the individual defendants could not be cloaked with qualified immunity because there was no evidence that would permit a determination that a reasonable officer could have believed Department dogs such as Volker did not constitute deadly force.

Circuit Judge Trott concurred and dissented, stating that the release of

a police dog to apprehend Chew was objectively reasonable as matter of law.

COUNSEL

George Denny, III, Law Offices of Ronald M. Katzman, Sherman Oaks, California, and Ralph Leardo, Law Offices of Nancy Ann Fellom, San Francisco, California, (argued) for the plaintiff-appellant.

Richard M. Helgeson, Assistant City Attorney, Los Angeles California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

On appeal, Thane Carl Chew seeks the right to pursue his claims for

damages resulting from dog bites inflicted on him by a police dog the Los Angeles Police Department uses to capture suspected criminals. Chew brought his action in federal district court pursuant to 42 U.S.C. section 1983. He sued the City of Los Angeles, Police Chief Daryl Gates, and various other members of the police department for violations of his Fourth and Fourteenth Amendment rights. The district court granted summary judgment to all of the defendants except Officer Daniel Bunch. When Bunch's case went to trial, Chew introduced evidence that the officer both turned the police dog loose on him and assaulted him directly. The jury returned a general verdict in the amount of $13,000

against Bunch. This appeal involves only the district court's grant of summary judgment in favor of the other defendants, including the city. We have jurisdiction under 28 U.S.C. 1291.

Although there are a number of important issues raised by this case, the two most fundamental are whether the Los Angeles Police Department's policy governing the use of dogs to seize fleeing or hiding suspects is unconstitutional and whether, if so, the officers who are responsible for promulgating that policy enjoy qualified immunity. The latter question, while important, is more of theoretical than practical import in this case because if the policy is

unconstitutional the city will be liable for whatever damages result in any event.

With respect to the first question, a majority concludes that the district court erred in holding the police department's policy governing the use of dogs constitutional. We do so for somewhat different reasons. Judge Norris prefers to concentrate on the issue of whether the force involved--the use of police dogs to seize and bite people--is deadly while I would approach the issue more broadly: by examining the question whether the force is excessive - deadly or not. Nevertheless, our conclusions are similar and both issues must be considered by the factfinder upon

remand. Accordingly, we reverse the district court's judgment in favor of the city. Because the matter is here on summary judgment, we do not now hold the city's policy unconstitutional but merely remand for a trial by jury of the substantial Fourth Amendment issues that exist.

With respect to the question of qualified immunity, a different majority, Judge Trott and the author, agree that the individual policymakers may not be held liable. We conclude that the law with respect to the use of police dogs to seize and bite concealed suspects was not sufficiently established that a reasonable officer would have known that the Los Angeles Police Department's policy was

unconstitutional.

I. Facts and Proceedings

At about 2 p.m. on September 4, 1988, an officer of the Los Angeles Police Department stopped plaintiff Thane Carl Chew for a traffic violation in part of the City of Los Angeles known as Pacoima. Chew subsequently fled from the officer on foot and hid in a scrapyard. The officer had not searched him for weapons. Upon discovering that there were three outstanding warrants for his arrest, the officer radioed for assistance. A police perimeter was set up around the scrapyard, and a helicopter and canine units were called in to search for Chew.

Officer Bunch and his charge,

police dog Volker, were among those dispatched to assist in the search of the scrapyard. Bunch unleashed Volker and, approximately two hours after Chew had fled to the yard, Volker found him crouching between two metal bins. According to Chew, as soon as he became aware of Volker's presence, he attempted to surrender and yelled to the police to call off the dog. Both sides agree that at this point Officer Bunch was not within sight of Volker. The parties further agree that Officer Bunch did not immediately accede to Chew's request, that Volker bit Chew several times and then seized him, and that Chew sustained severe lacerations to his left side and left forearm. Chew asserts that he did not offer

resistance at any time after he spotted the dog and repeatedly begged the officers to restrain his dog, but Bunch instead ordered Volker to attack. Bunch, on the other hand, vigorously denies that he ordered an attack and maintains that when he first saw Chew, the suspect was hitting the dog with a pipe. Bunch admits kicking at Chew in an attempt to disarm him and to protect Volker, and acknowledges that he may have kicked Chew in the head, face, or body.

Chew subsequently brought this action in federal district court, alleging violations of his Fourth and Fourteenth Amendment rights. The first claim of Chew's amended complaint named Officer Bunch, Sergeants Donald Yarnall

and Mark Mooring (who trained the L.A.P.D. canines), and Captain Patrick McKinley (who had overall supervisory responsibility for the K-9 unit) as defendants in their individual capacities. In his second claim, Chew sued the City of Los Angeles under Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), for injuries allegedly resulting from the city's policy regarding the use of canine force. In the latter claim he also named Police Chief Daryl Gates in both his individual and official capacities as an employee with policymaking authority.[1]

The district court granted summary

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[1]McKinley was also named in the second claim as a policymaker.

judgment in favor of the individual defendants other than Bunch on the ground of qualified immunity, and in favor of the City of Los Angeles on the ground that Chew had failed to demonstrate that a city policy unlawfully caused his injuries. The case proceeded to trial against Officer Bunch, and the jury rendered a $13,000 general verdict in Chew's favor. Pursuant to California Government Code 815.2 and 825, the city has paid the judgment and attendant fees and costs on Bunch's behalf.

II. Article III Jurisdiction

The city and the other remaining defendants contend that Chew has been fully compensated by the $13,000 verdict against Bunch, and that in view

of the city's decision to assume "full responsibility" for all damages, no real case or controversy with Chew remains. According to the defendants, allowing Chew to pursue the instant action any further would result in an "advisory opinion" that has already been fully redressed. Therefore, the defendants argue, we lack Article III jurisdiction over the present appeal.

Defendants did not raise this contention in the district court, perhaps in part because the judgment against Bunch was obtained after the court granted summary judgment for the remaining defendants. In any event, there was no reason for either party to have raised the question below. The issue relates solely to the effect of

an unchallenged judgment obtained against one defendant upon the plaintiff's right to appeal judgments in favor of other defendants. As such, it may be raised for the first time on appeal.[2]

Under Article III, federal appellate courts may adjudicate only actual, ongoing controversies between the litigants. Deakins v. Monaghan, 484 U.S. 193, 199 (1988). If there is no longer a live dispute between the

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[2]Neither party below wished to challenge the judgment against Bunch on the merits. The question of the preclusive effect of an unchallenged judgment may be raised initially when an appellant attempts to pursue a claim that his adversary believes to be barred. Accordingly the appellee may raise the issue for the first time by asserting a collateral estoppel or other preclusion argument in his appellate brief.

parties or a possibility that a plaintiff can obtain further relief, a case is moot. See Sea-land Service, Inc. v. International Longshoremen's & Warehousemen's Union, 939 F.2d 866, 870 (9th Cir. 1991) (case is moot if none of the issues within it is viable). Here, the defendants' position appears to be that the city's assumption of Bunch's liability to Chew precludes further litigation of his claims for additional relief, thus rendering the instant appeal moot. See 13A Charles Alan Wright et al., Federal Practice and Procedure, 3533.2 at 151 (Supp. 1993) (noting that mootness and claim preclusion are closely related doctrines).

[1] Chew's claims against the

defendants are not moot for two reasons. With respect to the first, we must start with the fact, ignored by the defendants, that the three constitutional violations alleged against Officer Bunch are different from the constitutional wrongs that they allegedly committed. Chew asserted that Bunch violated his constitutional rights first by improperly releasing Volker, a dangerous animal trained to bite and maul suspects, next by ordering the dog to attack him after he attempted to surrender, and finally by kicking him in the head and body. Chew charges that the other defendants violated his rights by adopting and implementing a policy of training and using police

dogs in an unreasonable manner. The allegations against the remaining defendants, if true, constitute wrongs distinct from any committed by Bunch, regardless of the fact that the dog bites are alleged to have resulted from the actions of all the defendants.

[2] Notwithstanding Chew's articulation of separate constitutional wrongs against the remaining defendants, those claims would be moot unless Chew could obtain some type of relief for them. See Sea-land, 939 F.2d at 870. The defendants assert that Chew is barred from seeking damages against them because the injury Chew incurred was fully compensated by the jury verdict and the subsequent payment of damages by the city on

Bunch's behalf. They are wrong. For the reasons set forth in the next section, Chew can recover actual damages from the remaining defendants. Moreover, it is well settled that a plaintiff may recover nominal damages for a "separate and distinct [constitutional] wrong" whether or not he is permitted to recover actual or punitive damages for that wrong. Larez v. City of Los Angeles, 946 F.2d 630, 640 (9th Cir. 1991). Thus, Chew would in any event be free to pursue his claims against the remaining defendants for nominal damages.

Chew's claims are not moot, and we have Article III jurisdiction over this appeal.

III. Issue Preclusion

The defendants' next contention, alluded to briefly above, is that the jury verdict and its subsequent satisfaction by the city serves to bar Chew from obtaining any actual damages against them. Whether they are correct depends upon the basis for the verdict. If it was based wholly or partly on the injuries inflicted by Volker after his release by the officer, the $13,000 damage award would necessarily represent a factual determination of the damages that Chew suffered on account of the dog bites. In that case both Chew and the defendants would be collaterally estopped from relitigating the issue of the dog bite damages. See RESTATEMENT (SECOND) OF JUDGMENTS 50(2) and comment d (1982); FSLIC v.

Reeves, 816 F.2d 130, 135 (4th Cir. 1987); Gill & Duffus Services, Inc. v. A.M. Nural Islam, 675 F.2d 404, 407 (D.C. Cir. 1982). Moreover, in that event, because the judgment obtained as compensation for the dog bite injuries would already have been paid in full, the so-called one satisfaction rule would preclude Chew from seeking a further monetary award from the remaining defendants for those injuries. See id.

The initial question, therefore, is whether the jury's verdict against Bunch was based, even in part, on the dog-bite injuries. The party asserting preclusion has the burden of showing that the issue as to which estoppel is claimed was actually adjudicated in a

prior proceeding. See Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980). Necessary inferences from the judgment, pleadings, and evidence will be given preclusive effect, but if there is doubt as to the scope of the prior judgment, collateral estoppel will not be applied. See Davis & Cox v. Summa Corp., 751 F.2d 341, 343 (9th Cir. 1985) citing Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). Where the prior judgment was based on a general verdict, the inquiry is whether rational jurors must necessarily have determined the issue as to which estoppel is sought. See id. ar 1519; see also United States v. Seley, 957 F.2d 717, 721, 722 n.3 (9th Cir. 1992) (applying collateral

estoppel where reasonable jurors could have reached only one of two conceivable results).

While, on the basis of the record before us, it appears that the jury may have compensated Chew for Volker's bites, we cannot say with any assurance that it did so. We simply have no way of knowing. It would not have been irrational or even unreasonable for the jury to have compensated Chew for Bunch's kicks and not for the dog's bites, or, to put it in more legalistic terms, for Bunch's direct rather than indirect assault. We can only speculate as to which injury or injuries underlay the verdict, and speculation will not support the application of collateral estoppel.

See Davis, 751 F.2d at 1519; see also Board of County Sup'rs v. Scottish & York Insurance, 763 F.2d 176 (4th Cir. 1985) ("We cannot distill special findings from a general verdict and to do so would intrude on the independent role of a jury as much as would a court's unilateral amendment of its verdict.") Consequently, we must presume, for collateral estoppel purposes, that the verdict compensated Chew for Bunch's kicks and not for Volker's bites.

This determination does not, however, conclude the issue preclusion inquiry. Specifically, Chew is left with the challenge of demonstrating that it is legally possible to assume that the jury found Officer Bunch not

liable for the dog bites and at the same time to hold the remaining defendants liable for them. That challenge is easily met. A judgment that Bunch is not liable for releasing Volker, given all of the circumstances, would not preclude a judgment that by implementing a policy of training and using the police dogs to attack unarmed, non-resisting suspects, including Chew, the remaining defendants caused a violation of Chew's constitutional rights. Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury. See Hopkins v. Andaya, 958 F.3d 881, 888 (9th Cir.

1992) (noting that "the police chief and city might be held liable for improper training or improper procedure even if [defendant police officer] is exonerated").

The jury in this case could have concluded that it was reasonable for Bunch to release Volker--even knowing what he was likely to do to Chew--given the fact that the procedures adopted by the city left him with no other means of apprehending the suspect that involved less risk of bodily injury to himself or the suspect. Because it is not clear that such a conclusion would be contrary to law or that rational jurors could not have reached that result, the doctrine of collateral estoppel does not preclude further

litigation of Chew's claims against the remaining defendants for actual damages on the basis an unconstitutional policy or the failure to supervise or train properly.

There is an additional reason why the verdict against Bunch does not bar Chew from seeking a remand for a further trial--a reason that applies only to the City of Los Angeles. The jury might have excused Bunch from liability for the dog bites on the ground of qualified immunity. — The district court instructed the jury that a public official is immune from liability "as long as his conduct does not violate clearly established constitutional or statutory requirements of which a reasonable

person would have known." The city is not entitled to a similar defense. See, e.g., Brandon v. Holt, 469 U.S. 464, 473 (1985). Because there is a possibility that the jury accepted Bunch's defense of qualified immunity and declined to award damages for the dog bites on that ground, the issue of the city's liability has not been actually and necessarily decided. See Barber v. City of Salem, Ohio, 953 F.2d 232, 237-38 & n. 1 (6th Cir. 1992) (explaining that verdict for defendant police officers entitled to qualified immunity did not preclude recovery against city).

[3] For these reasons, the satisfaction of the judgment against Bunch does not bar Chew from pursuing

his claims for actual damages for his dog-bite injuries against the remaining defendants. Moreover, because it is not clear that Chew has received any compensation at all for Volker's bites, the $13,000 judgment may not be subtracted from any future recovery he obtains for those injuries. Thus, whether they are labelled as arguments relying on mootness, claim preclusion, issue preclusion or the one satisfaction rule, the jurisdictional or procedural obstacles urged by the defendants present no barrier to any further proceedings in this case. We must therefore turn to the merits of the district court's grant of summary judgment in favor of all defendants other than Bunch.

IV. Merits

The district court granted summary judgment in favor of the remaining defendants on the ground that the use of Volker for the purpose of apprehending Chew was an objectively reasonable act. Chew v. Gates, 744 F.Supp. 952, 956 (C.D. Cal. 1990).[3] We must determine, viewing the evidence in the light most favorable to Chew,

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[3]The district court denied summary judgment against Bunch because of allegations of unreasonable conduct that applied solely to Bunch, namely, that Bunch ordered Volker to attach Chew after he attempted to surrender, and wrongfully kicked Chew in the head and body. Under the jury instructions, the jurors could have based their decision on the theory that the use of Volker was unreasonable in itself. Because summary judgment was denied, Chew was free, absent a contrary order by the court, to introduce evidence to support any theory comprehended by his complaint.

whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-1340 (9th Cir. 1989).

A. The City of Los Angeles

In order to succeed on his section 1983 claim against the city, Chew must demonstrate first that his seizure by Volker was unconstitutional and second that the city was responsible for that constitutional wrong. Monell, 436 U.S. at 690-94. Chew advances two distinct theories of Monell liability. First, he contends that Officer Bunch violated his Fourth Amendment right not to be subjected to excessive force by unreasonably releasing Volker and that

Bunch's action in releasing the dog (given the alternatives then available to him), the city's policy of training police dogs such as Volker to apprehend unarmed and non-resistant suspects by biting, mauling, and seizing them was itself unreasonable and unconstitutional.

The district court held that the city was not liable under either theory for the bites inflicted by Volker because "the manner in which the police dog was used to apprehend Chew did not, under the circumstances, infringe on his constitutional rights." 744 F.Supp. at 956.[4] Initially, we must

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[4]The district court was obviously referring only to the release of Volker and not to Bunch's alleged order to attack Chew after he attempted to surrender. The latter act, if it

determine whether the district court correctly concluded that Chew suffered no constitutional injury. Under Chew's first theory of municipal liability, whether a constitutional wrong was committed depends upon an assessment of the objective facts and circumstances bearing on the reasonableness of Officer Bunch's decision to release Volker. The existence of a constitutional injury under Chew's second theory is not dependent on the lawfulness of Officer Bunch's conduct, but instead turns on the reasonableness of the city's general policy of training dogs to bite and seize all suspects.

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occurred, would in any event have been contrary to city policy.

[4] For the reasons that follow, the district judge erred in finding as a matter of law that Officer's Bunch's decision to release Volker was reasonable. While the district court never reached them, there are also genuine issues of material fact with respect to whether Bunch's decision was made pursuant to city policy. Thus we are required to remand for trial on Chew's first theory of municipal liability. It is therefore unnecessary to determine whether the record requires reversal on Chew's alternative Monell theory as well. Specifically, it is not necessary to decide here wither the city's policy of training its police dogs to bite and seize is unconstitutional. However, on remand,

Chew is entitled to pursue that question fully, as well as any other theory of municipal liability as to which he can obtain probative evidence.

1. Bunch's Decision to Release Volker

With respect to Chew's first theory--that a triable issue of fact exists as to whether Bunch's release of Volker constituted the use of unreasonable force--we start from the fundamental premise that the use of force to effect an arrest is subject to the Fourth Amendment's prohibition on unreasonable seizures. See Graham v. Connor, 490 U.S. 386 (1989). There is, of course, no mechanical test for determining whether a particular application of force was unreasonable;

the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officer or officers. See id. at 396.

In determining reasonableness, "the nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced against the "countervailing government interests at stake." Id. (internal quotations omitted). To assess the gravity of a particular intrusion on Fourth Amendment rights, the factfinder must evaluate the type and amount of force inflicted. In weighing the governmental interests involved the following should be taken into account:

(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. Id.[5] The relevant inquiry is,

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[5]Other courts have supplemented these factors with such matters as whether a warrant was used, whether the plaintiff resisted or was armed, whether more than one arrestee or officer was involved, whether the plaintiff was sober, whether other dangerous or exigent circumstances existed at the time of the arrest, and the nature of the arrest charges. See Hunter v. District of Columbia, 943 F.2d 69, 77 (D.C. Cir. 1991). Their determination that the three factors articulated in Graham do not constitute the exhaustive criteria for determining excessive force is undoubtedly correct. In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider. These factors will all be appropriate for the district court to take into account on remand.

moreover, an objective one--good intentions will not redeem an otherwise unreasonable use of force, nor will evil intentions transform an objectively reasonable use of force into a constitutional violation. Id. ar 397. Because questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury. See Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991), cert. denied, 112 S.Ct. 2995 (1992); White by White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986).

[5] Here, the district court itself applied the "objective reasonableness" test. The court

reasoned that all three of the factors articulated in Graham v. Connor supported the decision to use canine force to arrest Chew, and on that basis held that Bunch's release of Volker was reasonable as a matter of law. When all disputes of fact are resolved in Chew's favor, as they must be for purposes of summary judgment, it is apparent that application of the Graham factors would not have required a rational jury to decide that using Volker to apprehend him was reasonable. Moreover, the district court's decision to take the excessive force question away from the jury conflicts with circuit law.

First, it is necessary to assess the quantum of force used to arrest

Chew. The three factors articulated in Graham, and other factors bearing on the reasonableness of a particular application of force, are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure--an analysis the district court never explicitly undertook.[6]

[6] By all accounts, the force

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[6]There are two ways to interpret the district court's silence on the question of the amount of force used. The district court might have found it unnecessary to analyze the degree of force used because it viewed canine force as slight and hence of little consequence, or because it found that the amount of force used was self-evidently justified on the record before it. Neither conclusion, however, is supportable. Moreover, the better practice is to explicitly state on the record the court's assessment of the quantum of force used to effect an arrest.

used to arrest Chew was severe. Chew was apprehended by a German Shepherd taught to seize suspects by biting hard and holding. According to the defendants, Volker had to bite the suspect three times before he could achieve an effective hold. Chew adds that, gripping his left side and then his left arm with his jaws, the dog dragged him between four and ten feet from his hiding place. Chew asserts that his arm was nearly severed. Officer Bunch acknowledged that the injuries to Chew's side and arm were "pretty severe," and that [t]here was some serious lacerations."[7]

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[7]Given the violent nature of Volker's attack on Chew, and considering the fact that Volker was still engaged in biting him when the officers came upon the scene, it is not

[7] Bunch had good reason to expect that Chew might sustain exactly this type of mauling when he released Volker. All of the K-9 officers testified that the police dogs were trained to bite suspects unless a countermanding order was given by the handler. Here, because Volker was sent to locate a concealed suspect, the dog would almost necessarily be out of sight of its handler, and hence beyond the reach of a countermanding order, if

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surprising that Chew was responding by hitting the dog with a metal pipe. (there is of course no indication that Chew was armed with that instrument when he fled his car. Rather, it appears that the pipe was in the scrapyard, readily available to Chew as a defensive weapon at the time Volker assaulted him.)

and when he came upon Chew.[8] Further, the deposition of Sergeant Mooring established that if a suspect attempted to elude the dog's bite instead of passively allowing the animal to maintain its hold, the dog would repeatedly bite the suspect in an effort to obtain a sustained grip with its jaws. Chief Gates' deposition disclosed that he was "very much" aware that such bites could be fatal, and Officer Bunch echoed this awareness. Cf. Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (burglary suspect died

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[8]This conclusion is buttressed by Sergeant Mooring's deposition testimony that there are "many, many cases" in which the dogs would be out of sight of their handlers, and that ordering the handlers to maintain constant surveillance over their animals simply would not be feasible.

of wounds inflicted when a police dog seized him by the throat).

[8] **Second,** it is necessary to turn to the district court's application of the Graham criteria, beginning with the most important single element of the three specified factors: whether the suspect poses an immediate threat to the safety of the officers or others. The record does not reveal an articulable basis for believing that Chew was armed or that he posed an immediate threat to anyone's safety. Cf. Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that fourth amendment permits use of deadly force to apprehend a fleeing felon where there is "probable cause to believe the suspect poses a threat of

serious physical harm"). Chew was initially stopped for a traffic violation. Before he fled, he was asked for his driver's license, and produced it. He also retrieved cigarettes and a lighter from his car, lit a cigarette, and engaged in a certain amount of conversation with the officer before his flight. Apparently, nothing about Chew's appearance or demeanor gave the officer reason to believe he should search the suspect. It appears from the record that after fleeing Chew hid in the scrapyard for an hour and a half before Bunch released Volker in an effort to capture him. The defendants do not suggest that Chew engaged in any threatening behavior during this time, or that he

did anything other than hide quietly. in light of these facts, a rational jury could easily find that Chew posed no immediate safety threat to anyone.

The existence of a factual question as to whether Chew posed a safety threat would in itself be enough to preclude summary judgment in favor of the defendants if we were to determine that seizing a suspect by means of a German Shepherd trained to bite hard then hold constitutes deadly force, see Garner, 471 U.S. at 11 (holding that fourth amendment does not permit use of deadly force to apprehend suspect who poses no immediate threat to the officer and no threat to others). Indeed, Judge Norris's separate opinion rests on the

conclusion that Chew has presented a genuine issue of material fact with respect to whether the Los Angeles Police Department's use of dogs constitutes "deadly force." He may well be right. However, it is not necessary to decide here whether the record sufficiently raises that question, for the grant of summary judgment must be reversed whether or not Chew adduced adequate evidence tending to show that the considerable force used here was "deadly." Of course, as stated earlier, Chew is free on remand to pursue the deadly force issue fully.

The other two specified Graham factors cut in favor of the defendants, but only slightly. With respect to

whether Chew was "actively resisting arrest," it is undisputed that he fled and then hid from the police. He did not, however, resist arrest to the point of offering any physical resistance to the arresting officers, nor, at the time the officers released the dogs, did they have any particular reason to believe that he would do so. With respect to whether he was attempting to evade arrest by flight when Volker was released, the answer is yes and no. In a general sense he was, but in more precise terms his flight had terminated, at least temporarily, in the scrapyard. Still, a slight edge goes to the government on this score.

Turning to the severity of the crime for which Chew was arrested,

although he was initially stopped for a traffic violation, the traffic officer later discovered the existence of three outstanding felony warrants for his arrest. The district court correctly pointed out that outstanding felony warrants are not to be taken lightly. However, in view of the fact that the record does not reveal the type of felony for which Chew was wanted, the existence of the warrants is of limited significance. A wide variety of crimes, many of them nonviolent, are classified as felonies. The Supreme Court has observed that "while in earlier times the gulf between felonies and the minor offences [sic] was broad and deep, today, the distinction is minor and often arbitrary." Garner,

471 U.S. at 14 (internal quotation omitted). It added" "the assumption that a felon is more dangerous than a misdemeanant [is] untenable." Id. The existence of three warrants for undetermined crimes--for which Chew had not been tried or convicted--is thus not strong justification for the use of dangerous force.[9] The significance of

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[9]While defense counsel contended at oral argument that the warrants were issued in connection with burglaries, this information was not part of the record before the district judge, and certainly was not known to Officer Bunch. Moreover, inclusion of this information in the record would make no appreciable difference to the analysis set forth in the text. In Garner, the Court noted that the fact that "an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous." Id. at 21. The Court also took notice of statistics showing that burglaries only rarely involve physical violence, and of the FBI's classification of burglary as a

the warrants is further diminished by the facts that Chew was completely surrounded by the police, and that the prospects for his imminent capture were far greater than are those of the many fleeing suspects who are fleeter than the police officers chasing them.

This was not an occasion on which the police were forced to make "split-second judgments" in circumstances that were "rapidly evolving." Graham, 490 U.S. at 397. Chew was trapped in the scrapyard for two uneventful hours before Volker bit and mauled him. There was time for deliberation and

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"property" rather than a "violent" crime. Id. Here, there is not even an indication that the burglaries for which Chew was wanted occurred at night. See Cal. Penal Code 460 (1988) ed.).

consultation with superiors. There was even time for the police to summon a helicopter to the scene, an airborne vehicle which apparently aided the dogs in their search. What other tactics if any were available--given the absence of urgency--is, again, a question to be explored upon remand.

[9] Under all of the circumstances, the question of the reasonableness of the decision to use the force involved, whether or not "deadly," to seize Chew must be submitted to a jury. When the record is viewed in the light most favorable to the nonmoving party, the Graham factors do not all support either side. However, the most important factor--the absence of an immediate safety threat--

cuts strongly in Chew's favor, while the other two tilt only slightly in favor of the defendants. Such a record does not render reasonable as a matter of law the considered judgment to unleash a German Shepherd trained to seize suspects by "biting hard and holding." by mauling and sometimes seriously injuring them. Moreover, while no circuit precedent is precisely on point, Reed v. Hoy 909 F.2d 324 (9th Cir. 1989), cert.denied, 111 S. Ct. 2887 (1991) appears to establish the existence of a jury issue a fortiori.[10]

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[10]Reed involved an angry confrontation between Deputy Hoy and Reed after the deputy arrived at Reed's residence to investigate a domestic dispute. Reed threatened Hoy first with a bamboo stick and then with a splitting maul. Hoy repeatedly warned Reed to put down the splitting maul, and retreated by walking backwards.

Reed demonstrates that whether a particular use of force was reasonable is rarely determinable as a matter of law. That decision controls the outcome of the excessive force question in this case. If Deputy Hoy's split-second decision to use deadly force in response to an impending threat to his own safety was not reasonable as a matter of law, we cannot say that in

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Reed refused to heed the warnings and continued to advance. Hoy then drew his service revolver, again warned Reed to put down the maul, and shot him in the chest. Reed sued under 1983, contending that Hoy used excessive force.

The court rejected Hoy's contention that his actions were reasonable as a matter of law, holding instead that on the records before it a rational jury could find for either party. Id. at 330. Certainly Reed presented a greater and more immediate threat than Chew.

this case the use of force that at the very least approaches deadly proportions meets that standard. See Garner, 471 U.S. at 11 (threat to officer and public must be immediate to justify application of deadly force).

[10] In conclusion, the question whether it was reasonable under the Fourth Amendment for Bunch to release Volker was for the jury.[11]

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[11]The defendants principally rely on Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) for the proposition that the use of a police dog to apprehend Chew was reasonable as a matter of law. Robinette was a Section 1983 action brought by the estate of a burglary suspect killed by a police dog who found him hiding in a car dealer's showroom, under a car. Robinette does not control the result here. First, Robinette, which predates Graham, appears to have been decided under the assumption that anything short of deadly force may constitutionally be used to apprehend a felon. See id. at 911-13; Jones v.

2. Municipal Liability

Although the district court ended its inquiry with the question whether Chew's constitutional rights were violated by the release of Volker (and the dog's subsequent conduct), we cannot. Because a genuine dispute of

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F. Supp. 965, 971 n. 3 (N.D. Ill. 1988). This assumption conflicts with the holding and the reasoning of Graham as well as with prior circuit law. See, e.g., Robins v. Harum, 773 F.2d 1004 (9th Cir. 1985). Second, the court in Robinette concluded that the officers on the scene had "probable cause" to believe that the suspect threatened their safety. 854 F.2d at 913. No similar showing of probable cause can be made here. Finally, in concluding that the use of canine force was reasonable, the court was heavily influenced by the fact that the suspect was "hidden inside a darkened building in the middle of the night." 854 F.2d at 913 & n. 5. This case does not involve similar circumstances; it involves a daytime arrest of a suspect who, though hiding, was surrounded and might well have been captured without the infliction of physical injuries.

material facts exists as to the constitutional violation, we must consider whether the district court's grant of summary judgment for the city may be affirmed on the ground that Chew's injury did not result from the application or enforcement of an official city policy. See Jackson v. Southern California Gas Co., 881 F.2d 638, 643 (9th Cir. 1989) (summary judgment may be upheld based upon any ground supported by the record.

Under the Monell doctrine, Chew may recover from the city if his injury was inflicted pursuant to city policy, regulation, custom, or usage. See Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 690-91 (1978). City policy "need only cause [the]

constitutional violation; it need not be unconstitutional per se." Jackson v. Gates, 975 F.2d 648, 654 (9th Cir. 1992); see also Collins v. City of Harker Heights, Tex., 112 S. Ct. 1061, 1067 (1992).[12] City policy "causes" an

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[12]Judge Norris' separate opinion is slightly, if unintentionally, misleading when it states that we must determine in this appeal whether the Los Angeles Police Department's policy is constitutional. See opinion of Judge Norris at 6986. Of course, we need not determine the constitutionality of the Department's policy here; we need only determine whether the district court properly granted summary judgment in favor of the city and its policy makers. Moreover, although Chew will certainly be free to argue on remand that the city policy is unconstitutional on its face, the city would not necessarily escape liability even if it showed that the policy is facially constitutional. To prevail at trial, Chew need not prove the policy unconstitutional. Rather, he need only show that the specific use of force (i.e., Bunch's decision to release Volker) violated the Constitution, and that city policy

injury where it is "the moving force" behind the constitutional violation, Monell, 436 U.S. at 694, or where "the city itself is the wrongdoer." Collins, 112 S.Ct. at 1067.

[11] There is little doubt that a trier of fact could find that Chew's injury was caused by city policy. In the district court, the city conceded, for purposes of summary judgment, the truth of Chew's contention that departmental policy authorized seizure of all concealed suspects--resistant or nonresistant, armed or unarmed, violent or nonviolent--by dogs trained to bite

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caused the unconstitutional application of force in this instance.

hard and hold.[13] Construing city policy as the appellee concedes we must, it doubtless could be found to be the "moving force" behind Chew's injury. Bunch released Volker because his superiors instructed him that he was authorized to do so under the

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[13] In their reply to the defendants' answer to the summary judgment motion, defendants stated:

> [Chew] states there is a factual issue as to whether the use of police dogs as of the date of the incident was "policy" or "not policy." Of course if it was not policy, there could be no Monell claim. However for the purpose of this motion it is assumed that it was "policy." [] He also states that there is a factual issue as to what the policy was.... [H]owever, for the purpose of his motion, it is assumed that the dogs are used to find and seize by biting a concealed suspect who refuses to surrender even if he offers no physical resistance to the dog.

circumstances of Chew's case. The instructions were based on what we assume to be city policy. Accordingly, we must reverse the district court's grant of summary judgment in favor of the City of Los Angeles.

In its brief on appeal, the city ignores the concessions it made in the district court and attempts to argue that even if the department's policy was to use dogs to apprehend concealed suspects by biting and mauling them, this policy was attributable only to the officers responsible for training the canine units, and not to the policy chief or the police commission--the to entities vested with the authority to make municipal policy. The city is bound by the concession it made in the

district court. However, even if it were not, summary judgment for the city would be inappropriate on this record.

A city cannot escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers. Los Angeles could not, for example, distance itself from policy regarding the use of firearms by de facto delegating the formulation of firearms policy to the commander of the police academy. So too here: if the city in fact permitted departmental policy regarding the use of canine force to be designed and implemented at lower

levels of the department, a jury could, and should, nevertheless find that the policy constituted an established municipal "custom or usage" regarding the use of police dogs for which the city is responsible. See City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

Further, even if we were to accept the city's argument that no jury could find that departmental canine policy was officially sanctioned, municipal liability could be found under the "deliberate indifference" formulation of Monell liability. See City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989). In order to accept the city's contention that departmental canine policy was not officially

sanctioned, we would have to find that the city itself had no policy regarding the proper use of canine force, or, at best, a policy of vesting complete discretion regarding the use of the canines in the dogs' handlers. The record contains evidence that the dogs bit suspects in over 40% of the instances in which they were used. Where the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the case in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use,

evidences a "deliberate indifference" to constitutional rights. Under such circumstances, a jury could, and should, find that Chew's injury was caused by the city's failure to engage in any oversight whatsoever of an important departmental practice involving the use of force.

Finally, as noted earlier, on remand Chew is not limited to pursuing any single theory underlying our decision that summary judgment was improper. The district court's grant of summary judgment to the city was based on the conclusion that Officer Bunch's decision to release Volker was reasonable. However, municipal liability need not be predicated on an "unreasonable" action on Officer

Bunch's part. A jury could conceivably decide, for example, that although the officer's on-the-scene decision to use canine force was reasonable under the circumstances, the city was nevertheless at fault for providing its officers with dogs trained to bite and seize all concealed suspects regardless of their efforts to surrender. If the plaintiff could prove at trial that training in less dangerous means of detection and apprehension was both feasible and effective from a law enforcement standpoint (and the city's recent adoption of a "find and bark" policy suggests that it may well have been[14]), then the city's failure so to

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[14]See "LAPD Begins Warnings on Use of Dogs," Los Angeles Times, September 30, 1992, part B, p. 3, col. 5

train its dogs may well have constituted an unreasonable municipal action regarding the use of force.

Judge Norris has written separately in order to discuss fully the critical issue of whether the city's policy regarding the use of police dogs violates the Garner deadly force rules. The matters set forth in his opinion are certainly appropriate for Chew to pursue and develop by means of a proper evidentiary showing on remand. Essentially, Judge Norris suggests that using police dogs trained to "bite and seize" suspects to locate and hold concealed individuals who are

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(reporting that the department has commenced training its dogs to bark and alert rather than to bite suspects).

not reasonably believed to be dangerous may violate the Fourth Amendment. He may well be correct. It is also possible, however, that siccing dogs trained in such a manner on any suspects would be found to violate that Amendment, if the method of training is found to be unreasonable in light of available alternatives. Both of these issues are deserving of full exploration upon remand.

B. The Individual Defendants

1. Prima Facie Liability

[12] Chew sues Gates, Mooring, McKinley, and Yarnall in their individual capacities.[15] Although

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[15]Chew also sues Gates in his official capacity. Official capacity suits generally represent only another way of pleading an action against the entity of which the officer is an

these defendants did not personally participate in the infliction of Chew's injury, they may be held individually liable if they "cause[d]" him to be subjected to a constitutional deprivation. Berguist v. County of Cochise, 806 F.2d 1364, 1369 (9th Cir. 1986), disapproved on other grounds, Canton v. Harris, 489 U.S. 378, 388 (1989). The existence of the requisite causal connection is implicit in the earlier conclusion that liability on the part of both Officer Bunch and the city could flow from Bunch's decision

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agent. Kentucky v. Graham, 473 U.S. 159, 165 (1985). Where, as here, the government entity receives notice and an opportunity to respond to the official capacity suit, "[the] suit is, in all respects other than name, to be treated as a suit against the entity." Id. at 166.

to use canine force against Chew. The remaining individual defendants all served as links connecting the officer and the city in this respect. Mooring and Yarnall designed and implemented departmental policy governing the use of canine force, McKinley had overall supervisory responsibility for the K-9 unit, and Chief Gates was not only responsible for the operations of the department as a whole, but was familiar with the canine incidents that occurred and regularly reported to the police commission on the performance of the K-9 unit. Viewed in the light most favorable to Chew, this evidence presents a genuine issue of material fact as to whether each of these defendants authorized,. approved, or

acquiesced in the canine force policy--a policy which may following trial be determined to constitute a cause of Chew's injuries. See Los Angeles Protective League v. Gates, 907 F.2d 879,894 (9th Cir. 1990); McRorie v. Shimoda, 795 F.2d 780, 783-84 (9th Cir. 1986), citing Heller v. Bushey, 759 F.2d 1371, 1375 (9th Cir. 1985), rev'd and remanded on other grounds sub non., City of Los Angeles v. Heller, 475 U.S. 796 (1986).

2. Qualified Immunity*

[13] We conclude, however, that the district court's grant of summary judgment in favor of the individual defendants other than Bunch on the ground of qualified immunity was proper. For the purposes of this

section, we continue to assume that departmental policy authorized the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing then. 744 F.Supp. at 954. Whether the defendants are entitled to qualified immunity for their actions in formulating or implementing such a policy "turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (internal cites and and quotation marks omitted). Specific precedent is not required in order to overcome a qualified immunity defense, but the law in question must

be sufficiently clear that the unlawfulness of the action would have been apparent to a reasonable official. Id. at 640. Here, a reasonable law enforcement official might well have failed to recognize that authorizing or implementing the policy at issue would result in the violation of the constitutional rights of persons seized by the police dogs.

[14] When the incident that led to the filing of this lawsuit occurred, the use of police dogs to search for and apprehend fleeing or concealed suspects constituted neither a new nor a unique policy. The practice was long-standing, widespread, and well-known. No decision of which we are aware intimated that a policy of using

dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful. At the time of the incident in question,, the only reported case which had considered the constitutionality of such a policy had upheld that practice. See Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (holding that use of police dog trained to bite a suspect's arm or other available limb to apprehend a burglary suspect hiding in a darkened building was constitutional). We are certain that Robinette is not consistent with the law of this circuit today, see supra note 10, and seriously doubt whether we would ever have reached a similar result. Nevertheless, at the time of Chew's arrest, Robinette was

the only appellate decision in the general area.[16] Because of the then

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[16]In attempting to distinguish Robinette, see Opinion of Judge Norris at 7000-1, Judge Norris ignores one crucial point; the dog in that case was trained and employed in essentially the same fashion as the dogs at issue here, and the Sixth Circuit held that dogs trained in such a manner did not constitute deadly force, even though the dog in Robinette killed the plaintiff's decedent. Our inquiry on the deadly force issue for qualified immunity purposes asks whether a reasonable officer would have known that the use of police dogs in this manner constituted deadly force. Robinette held that a police dog, trained to hold and bite, which killed someone did not constitute deadly force. In light of this decision it is difficult to understand why a reasonable officer should have known that L.A.P.D. police dogs trained and employed in a similar manner would be held to be deadly force, especially since there is no evidence in the record that any L.A.P.D. dog ever killed anyone.

Judge Norris reads Robinette as being a decision about whether or not a "particular dog" constituted deadly force. See Opinion of Judge Norris at

current widespread acceptance of the practice of using police dogs to make arrests, and the absence of any contrary authority, we conclude that at the time of Volker's assault there was

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7000-1. It should be obvious, however, that the Sixth Circuit would not have issued a published opinion if its decision were so narrowly limited. If we were ordinarily to read cases in the manner in which Judge Norris reads Robinette, Brown v. Board of Education, 347 U.S. 483 (1954), would stand for the proposition that separate is inherently unequal only in Topeka, Kansas, (or possibly only as to Linda Brown), Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), would stand for the proposition that the courts have the power of judicial review only when considering the validity of a statute conferring mandamus jurisdiction, and our judiciary would be in an even worse state than it already is. Certainly, in the case before us, a police officer in the Sixth Circuit would have been entitled to qualified immunity. Under all of the circumstances, see discussion infra, we believe an officer in the Ninth Circuit was entitled to that protection as well.

no clearly established law prohibiting the use of dogs in the manner permitted by the Los Angeles Police Department's policy.

Chew contends that it was apparent from several district court decisions discussing the use of police dogs that the department's canine force policy was unlawful. See Luce v. Hayden, 598 F. Supp. 1101 (D. Me. 1984); Soto v. City of Sacramento, 567 F. Supp. 662 (E.D. Cal. 1983); Starstead v. City of Superior, 533 F. Supp. 1365. 1365 (W.D. Wis. 1982). The facts in all of these cases differ dramatically from the circumstances in which the use of dogs was authorized under the L.A.P.D. policy. In Luce, the plaintiff claimed that state troopers "sicced" a dog on

him while he was lying prone and handcuffed. Similarly, in Soto, the plaintiff alleged that he had surrendered, was lying on the ground, and had spread his hands pursuant to police instructions when the police released the dog that bit him. Finally, Starstead dealt with a number of completely gratuitous uses of canine force, including the use of biting dogs against handcuffed suspects and against a defendant stopped for a traffic violation. The circumstances in these cases are far too far removed from the policy involved here to be of any aid to Chew.

Marley v. City of Allentown, 774 F. Supp. 343, 345-46 (E.D. Pa. 1991), aff'd mem., 961 F.2d 1567 (3d Cir.

1992), does not support Chew's claim, either. Marley was decided after the incident in this case, and it involved an episode which took place after Chew's apprehension. Accordingly, at best the decision is of limited use in determining whether the policy at issue here was clearly unlawful at the time the defendants formulated and implemented it. Marley also involved a very different set of circumstances from this case. The district court in Marley distinguished Robinette on two grounds: (1) that the suspect in Robinette was a suspected felon, while the suspect in Marley was a suspected misdemeanant; and (2) that the suspect in Marley was "either fleeing or stopping," while the suspect in

Robinette was hiding. Id. at 345. On both grounds, Chew's case is much closer to Robinette than to Marley.[17]

We conclude that as of the time Chew was bitten by Volker the

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[17]Judge Norris suggests that we miss the point by noting the factual distinctions between this case and Marley. He purports to rely only on Marley's qualified immunity methodology, a methodology he claims is "mandated by our recent decision in Mendoza." Opinion of Judge Norris at 7002. As we explain infra, the methodology employed in Mendoza does not compel a finding of qualified immunity in this case. Although "generic principles of excessive force law," Opinion of Judge Norris at 7002, would lead a reasonable officer to conclude that under some circumstances it would be unlawful to use a police dog, those same generic principles would lead a reasonable officer to believe that under other circumstances it would be lawful to do so. In light of the well established nature of policies like the L.A.P.D.'s, and in light of the case discussing similar policies, this case falls squarely into the latter category.

Los Angeles Department's longstanding policy regarding the training and use of police dogs did not contravene clearly established law. We recently explained in Mendoza v. Block, No. 92-56225, slip op. 5619 (9th Cir. May 31, 1994), that "[w]e do not believe that a more particularized expression of the law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a 'weapon' might become unlawful." Mendoza, slip op. at 5629 (emphasis added). While our statement was quite simple, if not self-evident, and was limited to the proposition that some uses of dogs will in particular instances violate clearly established

law, in his dissent Judge Norris transmutes that modest statement into an all-encompassing and pervasive pronouncement governing all uses of force. He claims that Mendoza stands for the proposition that "the law governing all excessive force cases, regardless of the instrument used to apply the force, is 'clearly established.'" Opinion of Judge Norris at 7003 (emphasis in original). Remarkably, he argues that, Mendoza, establishes the rule that "the generic principles established in Garner" render the law clearly established in all excessive force cases. Opinion of Judge Norris at 7003. It is difficult to recognize in Judge Norris's description of the case what Mendoza

actually says, and we must respectfully decline to read Mendoza as establishing so broad and unprecedented a rule as Judge Norris urges.[18]

We read our decision in Mendoza as meaning exactly what it said: it clearly established that under some circumstances the use of police dogs is

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[18]Indeed, we see no way of limiting the principle Judge Norris would have us adopt: If Garner means that the law is clearly established in every excessive force case, then Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), must mean that the law is clearly established in every free speech case, and Trop v. Dulles, 356 U.S. 86 (1958), must mean that the law is clearly established in every cruel and unusual punishment case. In short, under Judge Norris's reading of Mendoza, we would always conclude that the law is clearly established, regardless of the nature of the issue. Compare Judge Norris's unlimited reading of Mendoza to his "particular dog" reading of Robinette. See Supra note 16.

unlawful. However, that conclusion clearly does not advance Chew's cause. The Mendoza court gave the following example of the type of conduct that it considered prohibited by clearly established law: "[N]o particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control." Id. at 5629-30. While this statement of law is indisputable, the policy at issue here is far different from the siccing of dogs on handcuffed arrestees. See supra p. 6974-75. Here, we must determine whether it was clearly established that it was unlawful to use police dogs to search

for and apprehend concealed suspects by biting and seizing them. At the time the individual defendants implemented the Los Angeles Police Department's policy, the answer was, without question, "No."[19] Indeed, the Mendoza

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[19]Our conclusion here is consistent with the analysis in Act Up! Portanld v. Bagley, 988 F.2d 868 (9th Cir. 1993), in which we employed a two-part analysis" to determine whether the defendants were entitled to qualified immunity: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" Id. at 871. In Act Up!, we answered the first question in the affirmative, because "it was clearly established in this circuit that it is unlawful to strip search an arrestee brought to a jail facility on charges of committing a minor offense, unless the officer directing the search possesses a reasonable suspicion that the individual arrestee is carrying or concealing contraband." Id. at 871-72 (footnote and internal quotations omitted). We then said that it was necessary to answer the second question, "whether a reasonable officer

opinion itself makes this clear, in a direct and unambiguous manner. In surveying the established law regarding "the appropriate use of police dogs," Mendoza, slip op. at 5628, the Mendoza court quoted the following statement from the district court opinion in the instant case: "Neither federal law nor

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could have believed probable cause (or reasonable suspicion) existed to justify a search or arrest." Id. at 873. In this case, however, we conclude that it was not clearly established that the use of dogs to search for, bite, and seize hiding suspects was either deadly force or unreasonable force. Thus we need proceed no further. Frequently, as here, the answer to Act Up!'s first question dictates our decision on qualified immunity, and not only when we decide that the law is not clearly established. In fact, in many cases the answer to the first part of the test will provide the total answer to the qualified immunity question, and a second and separate analysis will be unnecessary.

California law clearly prohibits the training and/or use of police dogs to find, seize, and hold suspects, by biting if necessary." Chew v. Gates, 744 F.Supp. 952, 954 (C.D. Calif. 1990), quoted in Mendoza, slip op. at 5628-29. Here, we simply reaffirm the statement we endorsed in Mendoza: when the defendants implemented the policy at issue in this case, it was not clearly established either that police dogs constituted deadly force, or that the use of dogs to find, bite, and hold concealed suspects was unreasonable.[20]

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[20]In light of Mendoza's reliance on the district court opinion below, we simply cannot comprehend Judge Norris's insistence on arguing that the case is controlling authority for his contention that the officers are not entitled to qualified immunity as a matter of law.

Although the decision in Robinette bolsters our conclusion that the officers are entitled to qualified immunity here, we rely principally on the fact that the policy employed by the Los Angeles Police Department was a longstanding official policy, which was well-known and similar to the policies employed in many police departments throughout the nation, none of which had been judicially questioned. Pace Judge Norris, we do not "regard Robinette as an automatic guarantee of qualified immunity to officers in . . . dog bite cases." Opinion of Judge Norris at 7000. Moreover, we do not mean to suggest by our decision that officers will be entitled to qualified immunity if they authorize the use of a

new weapon or tactic which violates constitutional norms, simply because there is no case stating that the specific weapon or tactic involved violates the Constitution. To the contrary, if new weapons or tactics are sufficiently similar in design, purpose, effect, or otherwise to weapons or procedures that have been held unconstitutional, so that a reasonable officer would have known that a court's holding of unconstitutionality would be extended to the new weapon or tactic, then qualified immunity will not apply. Similarly, even if a policy is long standing and no case has declared it unconstitutional, officers authorizing its continued use will not be entitled

to qualified immunity after a case has authoritatively declared unlawful other procedures that are not "meaningfully distinguishable." Wood v. Ostrander, 879 F.2d 583, 592 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990). Finally, we do not mean to suggest that all actions taken pursuant to a longstanding policy are necessarily immunized. An officer who unlawfully implements an official policy or ordinance in an egregious manner or in a manner which clearly exceeds the reasonable bounds of the policy is not entitled to qualified immunity, whether or not there is a case on point declaring such actions unconstitutional. In other words, even in the absence of relevant case law, if

the manner of implementation of an otherwise constitutional policy is not only unconstitutional but patently so, the officer will be deemed to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Moreover, the existence of an unofficial or unacknowledged policy or practice is not sufficient to immunize an officer from liability. The clandestine nature of such a policy may suffice to put a reasonable officer on notice that it violates established legal norms. Here, we simply do not believe that, given the historical facts and circumstances, the use of police dogs in the manner prescribed in

the Los Angeles Police Department's policy is sufficiently similar to other uses of force held to be unconstitutional by the courts to put reasonable law enforcement officials on notice that the department's policy violated the Fourth Amendment; nor do we believe that the individuals here seeking qualified immunity were otherwise put on notice by the nature of the conduct itself.

Because at the time of Chew's arrest the Los Angeles Police Department's longstanding, well-known practice of using police dogs to make arrests by biting and seizing was similar to that employed by other police departments across the country, because no court had ever questioned

such a practice, and because the practice is "meaningfully distinguishable" from other police conduct previously held unconstitutional, we conclude that the doctrine of qualified immunity is applicable. Accordingly, we affirm the district court's grant of summary judgment to all of the individual appellees, specifically, defendants Gates, McKinley, Mooring, and Yarnall.

V. The Dissent from the Reversal of the Judgment in Favor of the City of Los Angeles

When public concern rises dramatically over an issue like crime, and politicians in the highest offices throughout the land rush to abandon any pretense of a commitment to fundamental

constitutional principles, it is essential that judges keep their cool--that we, at least, remain determined to fulfill our role as the objective, steadfast guardians of individual liberty. First and foremost, it is our obligation to resist all temptations to succumb to hysteria, all inclinations to ignore our responsibilities and simply to join the pack.

Regrettably, it is necessary to add here that Judge Trott well knows that the reference to "the pack" is not to "decent people genuinely worried about the world in which they and their children live." Opinion of Judge Trott at 7009. Rather, the term obviously refers to those who in making or enforcing our laws knowingly and

hypocritically disregard the Constitution and instead do what is most expedient or serves their own self-interest. Judge Trott's maudlin attempt to portray himself as the defender of "the People" provides a fortuitous if most unfortunate example of that form of conduct.

Judges are not correspondents for Newsweek. We do not campaign for office in large, crime-ridden metropolitan areas. Nor, ordinarily, do we try to make the public believe that we are doing something about a problem when in truth we are not. Judges are supposed to be calm, dispassionate, and committed to the principles of law. We have a particular responsibility to the

Constitution, including the Fourth Amendment.

Judge Trott makes clear his distaste for the rules of law enunciated in Graham v. Connor and Tennessee v. Garner. It is unfortunate he feels that way--although that is his privilege. However, to call Chew a murderer and a rattlesnake is not. To accuse us of sending police officers to "the jaws of danger," Opinion of Judge Trott at 7033, demeans him and us. We are all experienced in the ways of law enforcement and of the Los Angeles Police Department. To talk of "judges tucked away behind magnetometers," Opinion of Judge Trott at 7008, is nonsensical.

There are serious legal issues

involved in this case that warrant informed discussion. Here, as with so many important issues, by exchanging reasoned views we could increase each other's understanding, and the public's as well. Rational, enlightened debate in this case could advance the interests of justice and the welfare of society. Judge Trott has the knowledge and experience to make a significant contribution to our efforts to balance societal interests and individual rights. Perhaps next tine he will do so.

As for this case, we are not free to abandon our responsibilities as Judge Trott suggests. We are not permitted by our oaths of office to leave the protection of constitutional

rights to the unreviewed discretion of "a police chief, an elected mayor, a police commission, and an elected city council." Opinion of Judge Trott at 7039. Today we do, however, leave the final answer as to the reasonableness of the city's policy and conduct to a jury, as the Constitution and our laws command.

Judge Trott grossly mischaracterizes today's holdings with respect to the use of excessive force. We do not send police dogs to the sidelines. We reverse a summary judgment order, so that there may be a full and fair factual trial before a jury of "the People" regarding the practices followed by the Los Angeles Police Department. No one should fear

or condemn such a trial, least of all a judge experienced in the law and in the legal process. The truth cannot be harmful in this case. The public has a right to know how the Los Angeles Police Department is training and using dogs that are capable of killing or maiming human beings--to know whether the City is acting within the law. In addition, the appellant, who was seriously injured, has a right to compensation if the police department has acted in an unconstitutional manner. To say, as does Judge Trott, that there is simply no legal question here is to denigrate the Constitution. It is to say that the police, unlike all others, are above the law--that their decisions as to how and when

deadly force shall be used are immune from judicial review. That way lies the beginning of the police state and the end of freedom.

VI. Conclusion

The judgment of the district court is **AFFIRMED IN PART** and **REVERSED IN PART**, and the case is **REMANDED** for further proceedings against the City of Los Angeles only.

Supreme Court, U.S.
FILED

No. 94 980 NOV 28 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF LOS ANGELES, a Municipal Corporation and Public Entity of the State of California,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Volume II of II

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CHEW v. GATES APPENDIX B

OPINION VOLUME 2

Volume 2 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THANE CARL CHEW,

Plaintiff-Appellant,

No. 91-55718

v.

D.C. No.
CV-89-5204-RG(Tx)

DARYL GATES, individually as Chief of Los Angeles Police Department; City of Los Angeles, a Municipal Corporation and Public Entity of the State of California; and DANIEL BUNCH; DONALD YARNALL; MARK MOORING; PATRICK McKINLEY; and DOES 1 through 10, 14, 16 through 20, inclusive, each individually and as a Los Angeles Police Officer,

OPINION

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California

Richard A. Gadbois, Jr., District Judge Presiding

Argued and Submitted
August 18, 1992 - Pasadena, California

Before: WILLIAM A. NORRIS, STEPHEN REINHARDT AND STEPHEN S. TROTT, Circuit Judge NORRIS, J., concurring in part and dissenting in part.

Thane Carl Chew was stopped by a Los Angeles Police Department ("LAPD") officer for a traffic violation and identified himself by presenting his driver's license. When the officer returned to his car to check Chew's record, Chew ran away. The officer pursued Chew, who scaled several fences during the chase before ultimately hiding in a scrapyard. During the subsequent search, which involved a number of officers and several K-9 units, Officer Bunch unleashed a police dog named Volker to find Chew. Defendants stipulated for summary judgment purposes that Chew "tried to surrender peacefully once he realized he had been found" by Volker. Defendants' Reply to Plaintiffs

Opposition to Defendants' Motion for Summary Judgment at 2 [hereinafter "Defendants' Reply"]. Nevertheless, Volker seized Chew by biting him hard and holding on to him. Volker was out of Officer Bunch's sight when he located Chew and initiated his attack. Volker's attack left Chew with severe bite injuries on his arm and torso. At the time Officer Bunch released Volker, Bunch knew only that there were three outstanding warrants for Chew's arrest on unspecified felony charges. Officer Bunch had no reason to believe Chew was armed.

The City of Los Angeles and the four individual officers charged with the policymaking responsibility for the LAPD canine policy (then-Chief Daryl

Gates, Captain Patrick Mckinley, and Sergeants Donald Yarnall and Mark Mooring),[1] moved for summary judgment on the ground that the LAPD canine policy was constitutional. In their summary judgment papers, they made no reference to the facts of Chew's seizure by Volker. They merely submitted the LAPD's written canine policy and asked the court to declare it constitutional as a matter of law.[2]

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[1]I use the term "canine policy" to include both the LAPD policy regarding the dogs' training as well as its policy governing the officers' use of the dogs.

[2]See Defendants' Motion for Summary Judgment at 1 ("The policy or procedure sued [sic] by the Los Angeles Police Department to employ police dogs to find and to seize felony suspects who refuse to surrender is not in violation of the Fourth Amendment...."); id. at 8 105 S.Ct. 1699-1700 ("THE POLICY OR PROCEDURE OF

The individual policymaking defendants also argued that they were entitled to summary judgment on the ground of qualified immunity. The district court awarded these defendants summary judgment, which Chew appealed after the jury rendered a verdict in his favor against Officer Bunch.

I

The Constitutionality of the LAPD Canine Policy

A

This appeal requires us to judge the constitutionality of the LAPD canine policy under a well established principle of excessive force law: Deadly force may not be used to prevent

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THE LOS ANGELES POLICE DEPARTMENT IN IT USE OF TRAINED POLICE DOGS IS CONSTITUTIONAL").

the escape of a suspect unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Tennessee v. Garner, 471 U.S. 1, 3 (1985).

In Garner, police shot and killed a burglary suspect trying to escape by climbing a backyard fence. The suspect, Edward Garner, an eighth grader, was 15. He was unarmed. Ten dollars and a stolen purse were found on his body. See Garner, 471 U.S. at 3-4. The issue presented in Garner was the constitutionality of a Tennessee statute that permitted the use of "all necessary means" to apprehend fleeing suspects, whether dangerous or not. Id.

at 4. The Supreme Court held that the Tennessee statute violated the Fourth Amendment insofar as it permitted the use of deadly force to prevent the escape of a felony suspect who "poses no immediate threat to the officer and no threat to others." Id. at 11. In explaining its decision, the Court said: "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape." Id. (emphasis added).

In this appeal, we must apply Garner to decide the constitutionality of a municipal policy which permits the use of police dogs to prevent the

escape of all felony suspects, regardless whether the officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 3. See Los Angeles Police Department Canine Unit Manual at 5,9,38, 39,41,44,62 [hereinafter "LAPD Canine Manual"].[3]

The LAPD canine policy tracks the Tennessee statute in that it does not differentiate between dangerous and

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[3]The LAPD canine policy explicitly directs that dogs be trained to "seize by biting a concealed suspect who refuses to surrender even if he offers no physical resistance to the dog." Defendants' Reply at 2. Pursuant to that policy, dogs are trained to keep their bite-hold on a suspect unless and until they are called off by their handlers. See Deposition of Don Yarnall at 57, 59-61; Deposition of Daniel Bunch at 26-27; Deposition of Patrick McKinley at 44-46

non-dangerous felony suspects. The only material difference between the LAPD policy and the Tennessee statute is that the statute authorized the use of "all means necessary," whereas the policy authorizes only the use of dogs. If the use of the LAPD dogs constitutes the use of deadly force, Garner would stand in the way of defendants' motion for summary judgment because the LAPD canine policy would be unconstitutional, as the Tennessee statute was unconstitutional, for permitting the use of deadly force to prevent the escape of felony suspects who do not pose "a significant threat of death or serious physical injury to the officer or others." Garner, 471 U.S. at 3. Accordingly, defendants'

summary judgment motion in its present form must be denied because the critical question whether the use of LAPD dogs, as trained and deployed, constitutes the use of deadly force cannot be decided as a matter of law on the summary judgment record before us.

Deadly force is force that creates a substantial risk of causing death or serious bodily harm.[4] A gun plainly

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[4]See Model Penal Code 3.11(2) (1962) (deadly force is "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm"); see also Mattis v. Schnarr, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) (en banc) (using Model Penal Code definition of deadly force); Pruitt v. City of Montgomery, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (same); Ryder v. City of Topeka , 814 F.2d 1412, 1416 n.1 1 (10th Cir. 1987) (same); Robinette v. Barnes, 854 F.2d 909, 912 (6th Cir. 1988) (same).

qualifies as deadly force. Whether a dog also qualifies depends on how it is trained to behave when confronting a suspect. For example, a dog trained to find a suspect and bark until the dog's handler arrives would plainly not qualify as an instrument of deadly force.[5] But a German Shepherd that is

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[5] Chew stresses that how a dog is trained and used is critical to the determination whether it constitutes a deadly instrument. In his papers opposing summary judgment, Chew distinguishes between two different ways of training and using police dogs: a "find and bark" policy, where dogs are trained not to attack and bite a stationary, non-resisting suspect, but instead to bark until the dog's handler arrives, and a "find, bite, and hold" policy such as the LAPD's. See Chew Opposition to Defendants' Motion for Summary Judgment at 5-9. In fact, Chew has documented how, throughout the 1980s, the LAPD vacillated between these two different policies. According to Chew, beginning in 1980, the LAPD trained its police dogs to find, bite, and hold suspects even if

behaviorally conditioned to go directly for a suspect's jugular would surely qualify as an instrument of deadly force.

Whether a particular instrument of force qualifies as an instrument of deadly force is a question of fact.[6]

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the suspects were stationary and not resisting the dog. In 1984, this policy was abandoned in favor of a find and bark policy used by many other law enforcement agencies. In 1988, the LAPD returned to its original find, bite, and hold policy. See Id. at 5-6. More recently, it has apparently returned to a find and bark policy. See "LAPD Begins Warnings on Use of Dogs," L.A. Times, Sept. 30, 1992, at B3.

[6]See e.g., United States v. Schoenborn, 4 F.3d 1424, 1433 (7th Cir. 1993) (whether an object constitutes a dangerous weapon under 18 U.S.C. 113 is a question of fact that necessarily depends on the particular facts of each case); Robinette v. Barnes, 854 F.2d 909, 912 (6th Cir. 1988) ("[M]any law enforcement tools possess the potential

for being deadly force. . . . [A]s any faithful reader of mystery novels can attest, an instrument of death need not be something as obviously lethal as a gun or knife. the ubiquitous 'blunt object' kills just as effectively."); United States v. Moore, 846 F.2d 1163, 1166 (8th Cir. 1988) ("The question of what constitutes a deadly and dangerous weapon' [under 18 U.S.C. 111] is a question of fact for the jury.").

State cases are in accord. See, e.g., People v. Fuqua, 58 Cal. 245, 247 (1881) ("There may . . . be cases in which [a weapon's] character. . . depends upon the manner in which it was used, and thus becomes a mixed question of law and fact. In cases of the latter kind the character of the weapon must be left to the determination of the jury, under appropriate instructions."); People v. White, 212 Cal. App. 2d 464,465(1963) (holding that whether any particular instrument constitutes a deadly weapon is "at most a mixed question of law and fact to be determined by the jury upon proper instructions"); People v. Tophia, 167 Cal. App. 2d 39, 47 (1959); People v. Russell, 59 Cal. App. 2d 660,665(1943) ("[I]n determining whether an instrument, not inherently deadly or dangerous, assumes these characteristics, recourse may be had to

Indeed, whether particular dogs trained and deployed qualify as deadly weapons has been uniformly treated as a question of fact for the jury.[7] On the

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the nature of the weapon, the manner of its use, the location on the body of the injuries inflicted and the extent of such injuries."); People v. Simpson, 134 Cal. App. 646,651(1933).

[7] For example, in Marley v. City of Allentown, 774 F. Supp. 343 (E.D. Pa. 1991), aff'd without opinion, 961 F.2d 1567 (3d Cir. 1992), the jury was instructed to decide whether or not the use of a dog that caused serious injuries to a fleeing suspect constituted the use of "deadly" force. Id. at 346. After the jury returned a verdict for the suspect, the city moved for judgment notwithstanding the verdict on the ground that the deadly force instruction should not have been given because the weapon used was merely a dog. The district court denied the motion. See id.; see also State v. Sinks, 168 Wis. 2d 245 (Wis.Ct.App. 1992); People v. Nealis, 232 Cal.App.3d Supp. 1 (1991); State v. Bowers, 239 Kan. 417 (1986); People v. Kay, 121 Mich. App. 438 (1982); Michael v. State, 160 Ga App. 48 (1981).

evidentiary record before us, the question whether or not the LAPD dog started to bite and hold suspects, constitute instruments of deadly force is an issue of fact that cannot be decided at summary judgment.

In their summary judgment papers, defendants fail to address this question: whether the dogs they train

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In Nealis, 232 Cal.App.3d Supp. 1, the California Court of Appeals affirmed a conviction for assault with a deadly weapon that involved the siccing of a Doberman Pinscher. The court explained first that "whether a specific dog in a given case is a 'deadly weapon or instrument' is ultimately a question of fact for the jury." Id. at 4. After emphasizing that the conclusion "will depend upon the circumstances of each case," the court reasoned that there was sufficient evidence regarding the viciousness of the dog to support defendant's conviction for assault with a deadly weapon. Id. at 6.

to bite and hold suspects are deadly force. They proffer no evidence whatsoever on the magnitude of the risk that their dogs will kill or seriously injure suspects. They provide no empirical data, for example, showing how frequently LAPD dogs bite the suspects they confront or the seriousness of the injuries suspects sustain when they are bitten. In short, defendants ask us to declare their canine policy constitutional as written without the benefit of evidence on the risk of harm the dogs represent.

In opposing the summary judgment motion, Chew proffered considerable evidence that the LAPD dogs, as trained and deployed, create a substantial risk of serious injury to suspects. He cites

deposition testimony of Sergeant Yarnall that Volker was not trained to grip only a suspect's arm or leg, but instead was trained to bite whatever part of the suspect's body was necessary for an effective hold. See Chew Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 14 (citing Deposition of Yarnall at 33-35). Chew also cites deposition testimony of then-Chief Daryl Gates that Gates was "[v]ery much" aware that Volker, as trained, could maim and even kill a suspect, Deposition of Daryl Gates at 21,[8] as well as testimony of

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[8]In addition, Chew points to deposition testimony of Sergeant Mooring who estimated that suspects suffer bite injuries in over 40 percent of the cases in which police dogs are

Officer Bunch acknowledging that dog bites can be "fatal" or cause "serious and permanent" injuries, Deposition of Bunch at 30-32. Furthermore, Bunch acknowledged that Chew's injuries were "pretty severe," with "serious lacerations." Id. at 126. When read in a light most favorable to Chew, this evidence raises a genuine issue of material fact as to whether the LAPD dogs, as trained and deployed pursuant to the LAPD canine policy, create "a substantial risk of causing death or serious bodily harm." Model Penal Code 3.11(2).[9]

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deployed. Deposition of Mark Mooring at 72-75.

[9]Even if it is determined on remand that the use of LAPD dogs such as Volker does not constitute the use

In sum, the Supreme Court held in Garner that by authorizing the use of deadly force against all fleeing felons, the Tennessee statute was based on an anachronistic brightline distinction between felons and misdemeanants. As the Court made clear, the critical factor in determining when the use of deadly force is warranted is not whether the law classifies the suspect's crime as a felony or as a misdemeanor, but whether the suspect poses a significant threat of harm to

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of deadly force, I agree with Judge Reinhardt that defendants would still not necessarily be entitled to prevail in this action. The objective reasonableness of the City's canine policy--as written and as applied to the particular facts of this case--would still turn on a genuine issue of material fact. See Opinion of Judge Reinhardt at 6965-66.

others. See Garner, 471 U.S. at 11, 14, 19-20. The LAPD canine policy relies upon this same outdated and constitutionally irrelevant distinction between felonies and misdemeanors. See LAPD Canine Manual at 5, 9, 38, 62. Thus, if the LAPD dogs, as trained and deployed, constitute instruments of deadly force, then the LAPD canine policy violates the Fourth Amendment in exactly the same manner as did the Tennessee statute because it fails to limit the application of deadly force to those suspects who pose a significant threat to others. Whether the LAPD dogs constitute instruments of deadly force is a genuine issue of fact which precludes summary judgment on the theory advanced by defendants--that the

LAPD canine policy, as written, is constitutional as a matter of law.

C

It is important to make clear that even if the unleashing of Volker constituted the application of deadly force against Chew, it would not have been excessive force if Officer Bunch had probable cause to believe that Chew posed a significant threat of serious bodily harm to themselves or to others. If he had probable cause to believe Chew posed such a threat, the use of deadly force to prevent his escape would have been objectively reasonable under Garner.[10] In that scenario, Chew

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[10]Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

would have no standing to challenge the constitutionality of the LAPD canine policy because he would have suffered no constitutional injury.

Whether Officer Bunch had probable cause to believe Chew posed a significant threat of serious physical harm to others is an issue of fact that cannot be resolved on summary judgment.[11] Officer Bunch knew that Chew was a felony suspect, but the nature of the felonies was unknown. And

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prevent escape by using deadly force." Garner, 471 U.S. at 11-12.

[11]Just as defendants stood mute in their summary judgment papers on the specific issue whether LAPD dogs such as Volker constitute instruments of deadly force, they stood mute on the issue whether Chew posed a threat to others.

after Garner, Chew's suspected felony status alone was insufficient to create the probable cause necessary to use deadly force. See Garner, 471 U.S. at 14 ("[T]he assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable."). The evidence in the summary judgment record does not establish as a matter of law that Chew posed any greater threat than Edward Garner did. In neither case did the officer have reason to believe the suspect was armed. In both cases, there was probable cause to believe the fleeing suspect was a felon, but no reason to believe he "pose[d] a significant threat of death or serious physical injury to the officer or others." Id. at 6986. Finally, in

neither case did the circumstances of the attempted escape add anything to suggest that the suspect was dangerous. Garner ran from the home where the burglary was committed through the backyard to a fence, which he had begun to climb when he was shot. Chew made a break for it while talking peacefully to the officer who had stopped him for a traffic violation, jumped several fences, and was hiding in a scrapyard when he was found by Volker. Despite Chew's attempt to surrender peacefully, see Defendants' Reply at 2, Volker seized Chew by biting him repeatedly. On these facts, we cannot grant summary judgment to defendants on the ground that Chew posed the requisite threat as a matter of law any more than we could

have decided that Garner posed the same threat as a matter of law.[12]

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[12]On this issue, Judge Trott engages in appellate factfinding in saying that Chew posed a significant threat of serious bodily harm to others. See Opinion of Judge Trott at 7011-15. Apparently. Judge Trott believes that police have probable cause to believe that anyone with an outstanding felony arrest warrant who flees by jumping fences and by hiding in places such as scrapyards poses such a threat. See Id. at 7014,7029. In support of his factfinding, Judge Trott approvingly quotes the testimony of Sergeant Yarnall, who stated: "You cannot assume that the man is not armed. You will die." Id. at 7013 (citing Deposition of Yarnall at 102). Yarnall's testimony is consistent with the LAPD canine policy which specifically instructs officers to assume that all felony suspects are armed. See LAPD Canine Manual at 41.

However, the position of Sergeant Yarnall, the LAPD Canine Manual, and Judge Trott is inconsistent with Garner, which holds that police cannot automatically assume that all fleeing felony suspects pose a significant threat of serious physical harm to others. See Garner, 471 U.S. at 21 (holding unconstitutional the use

C

In echoing defendants' refrain that the LAPD's canine policy is constitutional as a matter of law, Judge Trott raises the specter that our decision today may lead to "the elimination of the use of police dogs in this circuit to find hiding felony suspects," no matter how the dogs are trained or deployed. Opinion of Judge Trott at 7008-9. To dramatize the importance of well-trained police dogs 10 law enforcement and the public

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of deadly force against a felony suspect not known to be armed who fled the scene of a burglary by scaling a fence). Whether Judge Trott personally believes this Supreme Court law is unsympathetic to the realities of modem law enforcement is irrelevant to our disposition of this appeal.

safety, Judge Trott recounts the story of Pascha, the police dog that helped the LAPD apprehend a career violent criminal known as the "Balcony Burglar." Id. at 7034. However, the heroic story of Pascha has no bearing on the question before us: whether on this record defendants are entitled to summary judgment.

Like Judge Trott, I recognize that Pascha was a great hero. Also like Judge Trott, "I do not believe that the deployment per se of police dogs to find hiding felony suspects is unreasonable." Id. at 7032.[13] However,

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[13]On this point, Judge Trott's reasoning suffers a breakdown in logic. He fallaciously assumes that just because the use of police dogs is not always unreasonable, the use of police dogs is always reasonable. Opinion of Judge Trott at 7032.

I don't buy Judge Trott' s inflammatory rhetoric and doomsday prediction that denying defendants summary judgment will prevent the use of all police dogs in all instances. Lest my opinion be misinterpreted, I emphasize two points.

First, I am not saying that all police dogs, regardless of how they are trained and deployed, constitute deadly force. I am saying only that whether the police dogs, trained by the LAPD to bite and hold, are instruments of deadly force is an issue of fact that cannot be resolved on the summary judgment record before us. There are obviously many ways to train and deploy a police dog so that it is not deadly force, one of which is the "find and

bark" policy that is apparently once again in use by the LAPD. See supra note 5. Whether or not a dog is permitted to roam out of sight of its handler, as Volker was, would be another factor to consider.

Second, I am not saying that the use of a police dog, even if trained to deliver deadly force, is necessarily unreasonable. I am saying only that under Garner, if a dog is trained to deliver deadly force, then the Fourth Amendment requires that its use be limited to those situations where there is probable cause to believe that the suspect poses a significant threat of death or serious bodily harm. In the case of the Balcony Burglar, which involved the pursuit and apprehension

of a person suspected of committing numerous murders, rapes, and robberies, Pascha's use, whether deadly force or not, plainly did not violate the Fourth Amendment.

II

The City's Monell Liability

In resting its summary judgment motion solely on the argument that the LAPD's "find, bite, and hold" canine policy is constitutional as a matter of law, the City conceded that Officer Bunch acted in accordance with LAPD policy when he unleashed Volker to hunt down and seize Chew. See Opinion of Judge Reinhardt at 6968 n.13. On appeal, following the jury verdict that Officer Bunch violated Chew's Fourth

Amendment rights, the City has changed its tune. It now argues that Officer Bunch's actions constituted nothing "more than...a random act or isolated event that resulted in a constitutional rights violation." Appellees' Br. at 31. In other words, it argues that it is not liable for Chew's dog bite injuries because even if Volker's use in this case constituted an unreasonable seizure in violation of the Fourth Amendment, the City was not the "moving force" behind the violation. Id. at 32 (stating that "[t]here is no evidence of any policy to engage in the actions attributed to the officer"). See Monell v. Department of Social Servs. of City of New York, 436 U.S. 658, 694 (1978) (a city is

liable only if the city policy "causes" or is "the moving force" behind a constitutional violation).

The City's appellate position is a 180-degree reversal from its stipulated position below that Officer Bunch's use of Volker to seize Chew complied fully with the LAPD canine policy. I agree with Judge Reinhardt that we must hold the City to the concession it made for summary judgment purposes, see Opinion of Judge Reinhardt at 6967-69,[14] and reject the City's new Monell position--which it takes for the first time on appeal--distancing itself from Officer

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[14]I also agree with Judge Reinhardt that the verdict against Officer Bunch does not moot or preclude Chew's claims against the remaining defendants. See Opinion of Judge Reinhardt at 6953,6955-57.

Bunch's conduct.[15]

III

Qualified Immunity[16]

The individual defendants (Gates, McKinley, Yarnall, and Mooring), who

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[15]On remand, it is inevitable that the City will repudiate the stipulation it made for summary judgment purposes that Officer Bunch released Volker pursuant to LAPD policy. They have already tried to do so on appeal. The City's strategy makes the deadly force issue critically important to the proper resolution of Chew's claims. Under the Garner deadly force analysis, if the LAPD dogs are found to be instruments of deadly force, then the policy itself, insofar as it authorized the use of deadly force against non-dangerous felony suspects, would be unconstitutional. In that event, Officer Bunch's conduct would have been authorized by an unconstitutional canine policy.

[16]Although Judge Reinhardt and Judge Trott constitute a majority on the qualified immunity issue, I refer to the majority opinion as the "Opinion of Judge Reinhardt" for clarity.

had the policymaking responsibility for the LAPD canine policy, argue that even if the policy did violate the Fourth Amendment, they would have no liability for Chew's injuries because they enjoy qualified immunity. The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

A

The doctrine of qualified immunity requires a two-prong inquiry: "1) Was the law governing the official's

conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" Act Up!l Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). The first prong involves a pure question of law for the court to decide, Mendoza v. Block, No. 92-56225, slip op. 5619, 5626-27 (9th Cir. May 31, 1994); the second prong involves a mixed question of fact and law requiring the application of the clearly established law to the facts of the particular case.

1

The first prong of the qualified immunity test requires us to ask whether the Fourth Amendment principles governing the use of police dogs to

prevent suspects from escaping were clearly established at the relevant time. In Mendoza, also a dog bite case, the officers argued that the law governing the use of police dogs was not clearly established because of the paucity of case law specifically addressing the use of dogs in police work. We rejected that argument:

> The deputies argue that the law guiding the use of police dogs at the time Mendoza was bitten was not clearly established. They point to the lack of case law addressing the use of dogs to locate fleeing suspects, and argue that under the circumstances they could not

reasonably have known how to pattern their conduct so as to avoid liability.

This does not mean, however, that there was no clearly established law that would indicate to the deputies that a constitutional right might be violated when using a dog during an arrest. Mendoza argues that the use of a police dog in this case constituted excessive force. Officers have a considerable amount of guidance from the courts in the permissible use of force while making an arrest. It is clearly established that "[t]he use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure." White v.

Pierce County, 797 F.2d 812, 816 (9th Cir. 1986). "The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted." Id. This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. We do not believe that a more particularized expression of the law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a "weapon" might become unlawful. For example, no particularized case law is necessary for a deputy to know that

excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury. See Anderson, 483 U.S. at 640.

We therefore hold that the deputies' use of the police dog is subject to excessive force analysis, and that this law is clearly established for purposes of determining whether the officers have qualified immunity.

Id. at 5628-30 (emphasis added).

Mendoza is controlling authority that the first prong of the qualified

immunity test is satisfied in this case: the use of LAPD dogs is governed by established principles of excessive force law. It is a basic tenet of excessive force law that deadly force may be used only if necessary to prevent the escape of a suspect who poses "a significant threat of death or serious physical injury." Garner, 471 U.S. at 3. Thus, Garner held unequivocally that deadly force cannot be used to prevent the escape of all felons regardless of the danger they pose to others. Deadly force may only be used to prevent the escape of some felons--those who pose a serious threat to the safety of others.

2

The second prong of the qualified

immunity inquiry requires us to apply the clearly established principles of excessive force law to the facts of the particular use of force in this case. Here we must ask whether, in light of the clearly established law governing the use of force, a reasonable officer in defendants' policymaking position could have believed it constitutional to adopt a policy permitting the use of dogs to bite and hold felony suspects, regardless whether they posed "a significant threat of death or serious physical injury to the officer or others." Id. at 6986.

In Garner, the Court held that a Tennessee statute violated the Fourth Amendment to the extent it permitted the use of deadly force to prevent the

escape of felons who did not pose a significant threat of serious harm to others. After Garner, it could not have been clearer to the defendants that the LAPD canine policy was unconstitutional to the extent it authorized the use of deadly force to prevent the escape of felony suspects who did not pose the requisite threat. Because the LAPD policy does not limit the use of police dogs to felony suspects reasonably believed to be dangerous, the question whether a reasonable officer could have believed the LAPD canine policy was constitutional turns on whether a reasonable officer could have believed the use of LAPD dogs such as Volker did not constitute the use of deadly force.

That is a question we cannot decide on the summary judgment record before us. As I have already explained, a genuine issue of fact exists whether the LAPD dogs, as trained and deployed, constitute deadly force. See supra at 6989-91. For emphasis, I will repeat that defendants proffered no evidence in support of their summary judgment motion regarding the danger posed by the LAPD dogs, such as evidence of the type, frequency, and severity of injuries they have inflicted. On the other hand, Chew offered evidence such as the deposition of ex-Chief Gates, who testified that he was "[v]ery much" aware that Volker, as trained, could maim and even kill a suspect. See supra at 6989-90.

Accordingly, because we cannot decide whether a reasonable policymaker could have believed that the LAPD dogs were not deadly force, we cannot decide that defendants are entitled to summary judgment on the ground they rely upon in their motion--that a reasonable officer could have believed the LAPD canine policy was constitutional as written.[17]

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[17]It is important to realize that as policymakers the defendants must be held to a stricter standard of accountability than officers forced to make snap judgments in the heat of battle on today's dangerous streets. We are not addressing here the qualified immunity of a handler who in a split-second decision releases his dog against a suspect who shows a glint of metal in his hand. Instead, we are addressing the qualified immunity of high-level city officials entrusted with the weighty responsibility to study, analyze, draft, and implement an effective police policy that does not violate the Constitution.

B

Defendants' claim of qualified immunity is based almost exclusively on the Sixth Circuit's decision in Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988). In that case, a police dog bit a suspect's neck and killed him, an event that the Sixth Circuit said was an "extreme aberration." Id. at 912.[18] On the record before it, the court held that that particular dog did not constitute deadly force, and that the use of non-deadly force was reasonable

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[18]Although we cannot ignore the fact that, in this case, the use of a police dog did result in a person's death, we also cannot ignore the evidence in the record which indicates that this tragic event was an extreme aberration from the outcome intended or expected." Id.

under the totality of circumstances of the case. See Id. at 912-13. Alternatively, the court held that even if the dog was a deadly weapon, its use would have been reasonable because the suspect "threatened (the officer's] safety and the safety of the other officers present." Id. at 913. Defendants here argue they are entitled to qualified immunity because Robinette was the only relevant federal court of appeals opinion on the books when they adopted the LAPD canine policy.

In Mendoza, we discounted Robinette as authority on the issue of qualified immunity in other dog bite cases because it was "fact-specific." See Mendoza, slip op. at 5629 ("It is therefore questionable whether fact-

specific case law guided the deputies' use of a police dog when they arrested Mendoza."). We did not regard Robinette as an automatic guarantee of qualified immunity to officers in other dog bite cases. Instead, we affirmed the district court's award of qualified immunity because the district court had made a finding of fact, following an evidentiary hearing, that "Mendoza was fleeing arrest for a bank robbery. . . [t]he deputies believed he was armed. . . [and] the deputies could reasonably have believed he posed a danger not only to themselves but also to the property owners." Id. at 5631. Under these findings of fact, the use of police dogs to prevent Mendoza's escape would satisfy the requirements of

Garner even if the dogs constituted deadly force. See Garner, 471 U.S. at 11-12.

My colleagues seem to think that after Robinette, a reasonable officer could have believed it was constitutional to deploy German Shepherds trained to bite and hold even non-dangerous suspects. Implicit in their reasoning is the assumption that it follows, as the night the day, that once a particular dog is judicially determined to be an instrument of non-deadly force, a reasonable officer could believe that no dog is an instrument of deadly force, however trained and deployed.

My analysis rejecting defendants' claim of qualified immunity based on

Robinette is supported not only by Mendoza, but also by Marley v. City of Allentown, 774 F. Supp. 343 (E.D. Pa. 1991), aff'd without opinion, 961 F.2d 1567 (3d Cir. 1992). Because the Marley court applied qualified immunity analysis to the precise issue presented in this case--a claim of qualified immunity based on Robinette--it is instructive to lay out Marley in some detail.

Exactly as in this case, the officer in Marley staked his claim of qualified immunity on Robinette, moving for a directed verdict on the ground that the Sixth Circuit "said that the use of a police dog was not deadly force." Transcript of district court proceedings in Marley v. City of

Allentown, July 2, 1991, at 188-89. The district court denied the motion, and the case went to the jury with the instruction that "[d]eadly force means force that's likely to kill or likely to seriously injure. You heard about the training of the police dog and how it's handled. You need to determine whether or not that was deadly force under that definition." Id. at 200. Following the jury's verdict against the officer, he moved for judgment notwithstanding the verdict, again arguing that he was entitled to qualified immunity on the basis of Robinette.

In denying the motion, the Marley court used the same level of generality we later approved in Mendoza to

determine whether the applicable law was clearly established at the time of the officer's conduct. The Marley court refused to limit itself to police dog cases and instead considered the qualified immunity claim in light of the generic excessive force principles laid down in cases such as Garner. The Marley court cbserved that "[i]n Robinette, the . . . Sixth Circuit merely applied [Garner] to the facts of the case before it" and concluded that there was no Fourth Amendment violation. 774 F. Supp. at 345. The Marley court then explained that the application of Garner to the facts of its dog bite case led to a different result than the result in Robinette. Accepting the jury Finding that the dog

represented deadly force, the court held that in light of Garner, no reasonable officer could have believed it was lawful to use the dog to seize a fleeing suspect who "one could reasonably conclude... posed no threat to the officer." Id.

Marley's qualified immunity methodology--looking beyond dog bite cases to generic principles of excessive force jurisprudence and then applying those principles to the facts of the particular case--is not only correct, it is mandated by our recent decision in Mendoza. Mendoza teaches that under the first prong of qualified immunity analysis, generic principles of excessive force law apply regardless whether the particular instrumentality

of force involves "physical restraint, use of a baton, use of a gun, or use of a dog." Mendoza, No. 92-56225, slip op. at 5024. Garner provided explicit guidance for the LAPD policymakers that if they train dogs to bite and seize suspects in a way that creates a "substantial risk of causing death or serious bodily harm," Model Penal Code 3.11(2), they had better restrict their use to suspects reasonably believed to be dangerous.

Throughout Part IV.B.2 of Judge Reinhardt's opinion, my colleagues scramble their qualified immunity analysis by failing to consider separately the two independent prongs of the qualified immunity test. See supra at 6996,6998-99. They do so

because they fail to recognize that prong one--the "clearly established law prong--raises a pure question of law that does not turn on the particular facts of the case; the facts do not enter into the analysis until we reach the second prong, where we apply the established law--in this case generic principles of excessive force law--to the facts. This analytical flaw is demonstrated by the way they criticize my use of Mendoza and Marley as precedent. See Opinion of Judge Reinhardt at 6977 & 78. I cite both cases as authority that the law governing all excessive force cases, regardless of the instrument used to apply the force, is "clearly established." Indeed, I cite Mendoza

as controlling circuit authority that the first prong of the qualified immunity inquiry is satisfied in excessive force cases by the generic principles established in Garner. Mendoza should foreclose any further discussion on the first prong. In criticizing my limited use of Mendoza and Marley as precedent, my colleagues discuss the facts of those cases, as well as the facts of Chew's case, in a way that injects facts into what should be a pure question of law: "Was the law governing the official's conduct clearly established?" Act Up!, 988 F.2d at 871. The result is a fundamental and far-reaching error in deciding the qualified immunity issue at the wrong

level of generality.[19]

My colleagues also fail to recognize that I make use of Mendoza and Marley as authority that the second

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[19]Compare Opinion of Judge Reinhardt at 6977-78 ("Here, we must determine whether it was clearly established that it was unlawful to use police dogs to search for and apprehend concealed suspects by biting and seizing them.") (emphasis added) with Mendoza, No. 92-56225, slip op. at 5629 ("It is clearly established that '[t]he use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right . . . .' This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. We do not believe that a more particularized expression of the law is necessary. . . .") (citation omitted) and Marley, 774 F. Supp. at 345-46 (the officer "should have been aware of the constitutional constraints enunciated in Garner, and it was not objectively reasonable for him to think that unleashing a trained attack dog" to apprehend this fleeing suspect comporter with Garner.

prong of the qualified immunity test is fact-specific. In Mendoza, the district court granted qualified immunity on the basis of facts it found at a pre-trial evidentiary hearing; in Marley, the jury returned a verdict against the officer. The district court subsequently denied the officer's motion for JNOV. In other words, even though both were dog bite cases, the Mendoza and Marley courts reached different results on the qualified immunity issue by applying established generic principles of excessive force law to the particular facts of the case.[20]

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[20]My colleagues miss the point when they say that Marley could not have guided the Chew defendants in adopting the LAPD canine policy because that case was decided after the

C

Another reason offered by my colleagues for cloaking the policymaking officers with qualified immunity is that the LAPD canine policy was "a longstanding official policy, which was well-known and similar to the policies employed in many police departments throughout the nation, none of which had been judicially questioned." Opinion of Judge

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incident in this case. I do not cite Marley for that purpose; I cite it for its careful analysis of a similar plea of qualified immunity based on Robinette--first, that Marley considered generic excessive force law from cases such as Garner; second, that Marley recognized that particular dogs could be instrumentalities of deadly force and that that fact question is one for the jury; and third, that Marley discounted the value of the fact-specific case of Robinette in its qualified immunity analysis.

Reinhardt at 6978. First, there is no basis in the record for the majority's assertion that the policy was "well-known" and "similar" to other canine policies. Second, an unconstitutional police practice does not metamorphose into a constitutional practice by escaping judicial scrutiny over time. The happenstance that a particular police practice has not yet been "judicially questioned" is meaningless. Since courts do not sua sponte review police practices, the fact that a practice has not yet been "judicially questioned" may simply mean that an actual case or controversy that squarely presents the issue has not found its way into a published opinion.

To give the majority its due, it

at least acknowledges that if a police policy is not "'meaningfully distinguishable'" from a policy that has been declared unlawful, then qualified immunity may not be invoked no matter how widespread and longstanding the policy is. Opinion of Judge Reinhardt at 6979 (quoting Wood v. Ostrander, 879 F.2d 583,592 (9th Cir. 1989)). What the majority fails to explain is how the use of LAPD dogs--trained to roam beyond the handler's control, bite hard, and seize even non-resisting, non-dangerous suspects--is "meaningfully distinguishable" for Fourth Amendment purposes from the use of guns or other deadly weapons against non-dangerous suspects.

From the victim's perspective,

deadly force is deadly force, regardless of whether the force comes from the muzzle of a gun or the muzzle of a dog. Nor does it matter from the perspective of the law. The Fourth Amendment requires that an officer's use of force be reasonable regardless whether the force involves "physical restraint, use of a baton, use of a gun, or use of a dog". Mendoza, No. 92-56225, slip op. at 5024. Garner specifically limits the use of deadly force regardless of the instrumentality used. Garner, 471 U.S. at 31 (O'Connor, J., dissenting) (criticizing the majority's failure "to limit its holding to the use of firearms" only); see also Mathis v. Parks, 741 F. Supp. 567, 572 (E.D.N.C. 1990) ("Garner makes

clear that there are limits to the use of deadly force against arrestees, regardless of the nature of the instrumentality used in applying the force."). Because defendants have failed to produce a scintilla of evidence on the issue of the frequency and severity of the injuries caused by LAPD dogs, I cannot accept my colleagues' unexplained assumption that LAPD dogs such as Volker are "meaningfully distinguishable" from a gun in that they pose no "substantial risk of causing death or serious bodily harm." Model Penal Code 3.11(2).

In sum, after Garner, no reasonable officer could believe it lawful to authorize the use of deadly force against suspects who do not pose

"a significant threat of death or serious physical injury to the officer or others." Garner, 471 U.S. at 3. Accordingly, the individual defendants' claim of qualified immunity must necessarily turn on the factual question whether a reasonable policymaker could have believed that dogs trained pursuant to the LAPD canine policy did not pose "a substantial risk of causing death or serious bodily harm." Model Penal Code 3.11(2). In their motion for summary judgment, defendants stand mute on this question. They merely ask that their policy, as written, be held constitutional as a matter of law. At this stage of the litigation we cannot cloak the individual defendants with

qualified immunity since there is no evidence that would permit us to determine that a reasonable officer could have believed LAPD dogs such as Volker do not constitute deadly force.

CONCLUSION

Defendants are not entitled to summary judgment on the ground that the LAPD canine policy, as written, is constitutional as a matter of law. Furthermore, the City is not entitled to summary judgment on a Monell defense because, for purposes of summary judgment, it admitted to being the moving force behind Officer Bunch's deployment of Volker. Finally, the individual defendants who are responsible for the LAPD canine policy are not entitled to summary judgment on

the basis of qualified immunity.

TROTT, Circuit Judge, Concurring and Dissenting:

My respected colleagues have come to some unsupportable conclusions about this case that are irreconcilable with the real world of police work and its hazards. In so doing, I believe they have inappropriately hobbled the police in this circuit with respect to the use of a valuable tactic in connection with the difficult and perilous task of pursuing and arresting felons who seek to evade arrest by securing themselves in menacing environments. Thus, I am unable to join in the part of Judge Reinhardt' s opinion holding that the initial release of Volker by Officer Bunch constituted a use of unreasonable

force.[1]

At this moment in history, criminals are succeeding in doing what no foreign power has ever been able to accomplish: they have invaded our streets, parks, beaches, and backyards and made many feel like prisoners in their own homes. More and more, criminals are carrying and using firearms. This appalling condition is a matter of common knowledge and concern. As I write this dissent, Mayor Sharon Pratt Kelly of Washington, D.C., our nation's capitol no less, has

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[1]I do concur, however, in the part of Judge Reinhardt's opinion holding that defendants Gates, McKinley, Mooring, and Yarnall are entitled to qualified immunity. Judge Reinhardt's introduction to his opinion characterizes my views.

asked the President of the United States to call out the National Guard to combat crime in her city. The President himself says that violence is "tearing the heart out of America." Jonathan Alter, one of our nation's keenest observers, describes our condition this way:

The paradox of the American gun culture is that it is undermining the very values it was meant to protect. Remember Franklin Roosevelt's famous Four Freedoms? These were what we ostensibly fought World War II over. One of them was "freedom from fear." That battle has been lost. As crime grows arithmetically, fear grows geometrically. Even outside major cities, ours is now a land of real

freedom only during daylight and in certain neighborhoods. We've reached a point in recent years where otherwise optimistic, spontaneous people believe they must constantly peer over their shoulders as if they were being pursued by the secret police in some old communist regime.

This routinized fear is now so much a part of American life that we've begun to take it for granted. We instinctively avoid large sections of cities, using mental maps in our heads that are unavailable to tourists. In my case, it was a stay in Japan that jolted me into recognizing how much freedom I'd lost at home. Japan is crowded and culturally stifling, but it's possible to walk in a park in

Tokyo at midnight without the slightest trepidation, just as it was here as recently as the 1950s. This freedom felt strange to me, as if a state of fear about physical safety is normal. And it is. Barricading oneself at home all night is now natural; wandering around freely and alone--once the quintessential American experience--is foolhardy. Roads like Route 66 once symbolized freedom; they now symbolize danger. Even a timehonored cultural tradition like flipping the bird to some idiot driver is now in jeopardy. Instead of just screaming back, he might blow your head off. Jonathan Alter, There's a War On at Home, Newsweek, Sept. 27, 1993, at 42. Given this climate, the job of a police

officer has never been more difficult, or more dangerous.

Judge Reinhardt finds fault with my interest in relating our decision in this case to the world around us. I do so because I am not comfortable entombed in the purity of abstractions as we decide in Constitutional terms whether a tactic used by the police to apprehend hiding felons is reasonable. I believe that before judges tucked away behind magnetometers and deputy marshals in the safety of courtrooms tell police officers and hiding felony suspects which seizures are reasonable and which are not, we must integrate into our decision making process a thorough understanding of the context of the issue and all the practical

ramifications of our holding, one of which may be the elimination of the use of police dogs in this circuit to find hiding felony suspects. Because of fear of lawsuits and liability, this decision may be fatal to canine units, and by their demise, the ability of police to combat criminals will be seriously hampered. See Harlow v. Fitzgerald, 457 U.S. 800, 814 (1992) ("Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in their unflinching discharge of their duties.'") (citation omitted). Thus, it seems to me that the task of interpreting the principles in our Constitution and applying them

to various conditions and circumstances requires an understanding of human existence that is informed by more than law books.

Furthermore, I do not believe that grounding a holding on this issue in the realities of our times is either "succumbing to hysteria" or "joining the pack." The "pack," as Judge Reinhardt pejoratively chooses to call them, appear to me to include decent people genuinely worried about the world in which they and their children live; and the "hysteria" sounds to me like appropriate concern about their safety threatened by rampaging criminals. I doubt that we serve the People well by dismissing them as an hysterical pack or by telling them that

their elected leaders speaking out on this subject are hypocrites.

Ample precedent exists to support my approach to deciding whether something is unreasonable under the Fourth Amendment. Part of the genius of that amendment is its use of principles that are flexible enough to respond to evolving challenges and conditions. Three examples should suffice to make this point.

When the Supreme Court decided in New Jersey v. TLO, 469 U.S. 325 (1985) that searches of schoolchildren by teachers and administrators shall depend not on probable cause, but "on the reasonableness, under all the circumstances, of the search," id. at 339, the Court relied greatly on

information about contemporary conditions in schools. The Court said, "Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." Id. at 339.

The Court used the same approach in Michigan State Police v. Sitz, 496 U.S. 444 (1990) when it decided that sobriety checkpoints to combat drunk driving did not entail unreasonable seizures of motorists. In rejecting arguments that such seizures were unreasonable under the Fourth Amendment, Chief Justice Rehnquist said,

"No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it. Media reports of alcohol related death and mutilations on the nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in

property damage.'"

Id. at 451 (citations omitted). In a concurring opinion, Justice Blackmun observed that "for the period from 1900 through 1969 motor vehicle deaths in the United States exceeded the death toll of all our wars, adding that he was "pleased... that the Court is now stressing this tragic aspect of American life." Id. at 456.

Finally, the Supreme Court ended segregation by race in public schools based on a look at the reality of segregated education, not merely by resorting to theorization. The Court said, "In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted,

Q. How man felony warrants were there?

....

A. You mean when I got arrested?

Q. At that time, yes,

A. One.

Q. Okay. And what was that for?

A. Burglary.

....

Q. Was it a residential burglary, if you recall?

A. Yes.

Q. What about the burglary conviction of October of '88 in Lancaster; was that also a residential burglary?

A. Yes.

....

Q. Okay. And then what happened next?

A. [The officer who stopped me] proceeded back to his car.

Q. What happened next?

A. I lit a cigarette up.

....

A. I remember I was getting scared?

Q. Why were you getting scared?

A. Because I was unaware [sic] of me having a warrant.

Q. And what was the warrant for?

A. My understanding was burglary.

Q. Was it a bench warrant or

an arrest warrant, if you know?

A. That, I'm not sure of.

Q. Did you fail to appear for court?

A. Yes.

....

Q. Okay. So you're aware of one warrant out for your arrest that apprised you of a burglary; is that correct?

A. Yes.

MR. DENNY: [Counsel for Chew.] And his failure to appear for that burglary charge.

....

Q. And the officer went back to his car during that couple seconds?

A. Yes

Q. What happened next?

A. I panicked.

Q. Okay. Because of the warrant?

A. Yes.

Q. And what happened next?

A. I took off running.

Q. Did the officer ever frisk you at any time before he took off running?

A. Not that I remember.

Q. And where did you run to?

A. I think I was running eastbound if my recollection is - that's what I recall the direction.

Q. Did you cross San Fernando Road as you were running?

A. Yes.

Q. No particular place, but eastbound.

Q. How far did you run?

A. Until when?

Q. Until the first time you stopped.

A. Stopped or stopped running?

Q. Till the first time you stopped running.

A. Approximately 2,300 yards.

Q. Okay. And where were you when you stopped running?

A. In the scrap yard.

Q. Were you able to see the officer the first time you stopped?

A. Which officer?

Q. The one who had - you gave your license - who you gave your license to the first officer you saw?

A. I'm not sure.

Q. Did you look to see if he was chasing you?

A. Yes.

Q. And did you see him?

A. I couldn't tell you. I couldn't see him visually, but I saw his police car.

....

Q. When you first started running, what happened?

A. I started to run.

Q. And what happened next?

A. I then took off running towards the, I guess it would

be, southeast direction to the corner of the area that I was in.

Q. What happened next?

A. I was then going to proceed to jump another fence to get into a wash that was nearby.

Q. What happened next?

A. I looked to my right, I guess that would be south, and saw a police car.

Q. What happened next?

A. I then took off running again heading north if my directions are correct.

Q. What happened next?

A. I jumped another fence and proceeded running.

Q. What happened next?

A. I then jumped another fence and proceeded to run.

Q. What happened next?

A. I looked north of the scrap yard I was in at that particular time.

Q. And what did you see?

A. I saw between where the entrance gates come up and I saw what appeared to be a black and white police car driving northbound on Branford Street

....

Q. Okay. What happened next?

A. I then proceeded to run to the entrance gate.

Q. And where was that located?

A. Right there in front of Branford Street.

Q. What happened next?

A. I then approached - came up to the fence and proceeded to climb the fence.

Q. This is a fence on Branford?

A. Yes.

Q. Were you climbing - were you exiting the junk yard or entering the junk yard?

A. I was going to try to exit the junk yard.

Q. Okay. What happened next?

A. As I came to the top of the fence that I was climbing, I saw, if I remember right, two officers looking in the yard

that was - that I just came from, which was right next door.

Q. Okay. What happened next?

A. They both looked up at me or I should say I know of one for sure that looked up at me and saw me.

....

Q. Okay. After you saw the two officers, which you indicated you believe that one of the officers saw you, what happened?

A. I then jumped back into the scrap yard, not junk yard but scrap yard as I know it, and proceeded to run back to where the direction that I saw

the officer - the car drive by on Branford Street.

....

Q. And what happened after you got to the top of the fence?

A. That's when I saw, if I remember right, officers.

Q. Okay. And what did you do then?

A. I jumped down off the fence back into the scrap yard because I saw one officer. Both of them might have looked. I'm not sure. I know one looked up at and so I then jumped back down there.

....

Q. Okay. What happened after

you got to the approximate point of Point F [referring to a diagram]?

A. I then looked - no. That was when I heard what appeared to be a helicopter.

....

Q. Okay. And then what happened?

A. I then looked around.

Q. Okay. And you saw nothing but scrap metal; correct?

A. Yes. You might call it that, yes.

Q. And then what happened?

A. I then proceeded to hide myself.

....

Q. Okay. How did you hide

yourself?

A. I squeezed myself between what appeared to be - if I remember right, four dumpsters; one stacked on top of each other as one pile and the other eight which was one stacked on top of the other one were fairly closed to one another.

....

Q. Hiding. You were hiding between the dumpster for about two hours?

A. Yes, around there, yes.

Q. During those two hours, did you see or hear anything?

A. Yes.

Q. What?

A. A helicopter.

Q. Okay. Anything else? What else?

A. Commotion.

....

Q. Okay. Could you describe this commotion a little bit more, please, that you heard?

A. Well, it appeared to me it sounded like I heard - it sounded like not a regular voice but a voice over either a P.A. system, radio or - I don't know because I couldn't see.

Q. Okay. Okay. You hid yourself at point I and you waited there about two hours; correct --

A. Correct.

Q. -- until you were found;

is that correct?

A. Correct.

....

(emphasis added).

Chew was actively albeit silently resisting arrest. This entire episode was rife with life-threatening "split-second judgments" as the police searched for him. Bunch and Volker were in the yard for half an hour before Volker found him. Yet the majority opinion tries to characterize Chew's behavior as not menacing because he did not do "anything other than hide quietly." With all respect to my good friends, this is a false characterization that makes the event sound like a children's game of hide-and-go seek. The majority's claim that

a hiding quietly Chew posed "no immediate safety threat to anyone" adds new meaning to the word "absurd." Common sense tells us we must look at the circumstances from the perspective of the police, not the hiding suspect.

But perhaps the most upside-down argument in the majority's opinion is the following "syllogism":

1) A police dog is more likely to bite a hidden suspect than one out in the open;

2) Chew managed to conceal himself from the officers;

3) Therefore, Chew deserved to be protected from the dog.

This twisted logic inappropriately removes the responsibility for the increased risk from the suspect and

places it in on the officers, effectively rewarding concealment, resistance, and a refusal to surrender. Chew was responsible for this risk. Are we to call off searches when a suspect conceals himself because the risk of dog bites--or for that matter shootings--is thereby increased?

III

The recurring flaw in the majority's analysis is that it breaks the facts and circumstances of this case into disconnected pieces, gelds the pieces, and then argues that each deodorized piece does not demonstrate Chew was a safety risk. This approach is at war with the requirement that we measure the reasonableness based on the totality of the circumstances. The flaw

is most apparent in the opinion's treatment of (1) Chew's behavior before he panicked ("[N]othing about Chew's appearance or demeanor gave the officer reason to believe he should search [Chew before he fled]."); (2) Chew's behavior in the scrapyard ("The defendants do not suggest that Chew engaged in any threatening behavior during this time, or that he did anything other than hide quietly.") (3) Chew's attempt to resist arrest by wedging himself between the dumpsters ("He did not, however, resist arrest to the point of offering any physical resistance to the arresting officers."); (4) the significance of the outstanding warrants ("[Because] the record does not reveal the type of

felony ..., the existence of the warrants is of limited significance."); and (5) the length of the search ("Chew was trapped in the scrapyard for two uneven hours... ."). (emphasis added).

There are three errors of logic in this piecemeal approach. First, the opinion bases its ultimate conclusion on incomplete and mischaracterized premises. Second, the "no immediate safety threat to anyone" conclusion is tacitly assumed in each premise, i.e., the question is begged by sneaking the rabbit into the hat. Third, the fallacy of composition is mischievously at work insofar as each emasculated and quarantined piece of the whole is used to compel an adulterated and invalid conclusion. If this were a proper way

to reason, which it manifestly is not, one could easily make the case that World War II wasn't really a significant threat to our national security, just as the majority opinion claims Chew's behavior that afternoon did not pose an "immediate safety threat to anyone." No rational jury could so find.

This same kind of analytical mischief is also at work in the manner in which the majority characterizes the LAPD's K-9 policy. Just as the threat posed by Chew's behavior is belittled, the threat posed by police dogs operating under the LAPD 's policy is vastly exaggerated. The majority makes it sound like the purpose of the policy was to "maul" all suspects. This is

untrue, as is the idea that dogs were trained to attack and bite all suspects. The controlling Canine Manual makes it clear that care is taken to minimize the physical danger to suspects:

> "All protection, criminal apprehension and search training shall incorporate control training. Control training includes false starts, outs,[2] and out from attack, call outs, long outs, out while fighting, hold, hold and bark and transports. Great emphasis shall be placed on training as

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[2]An "out" is a command to a police dog to cease whatever the dog is doing and return to the handler.

it will ensure optimum control and will decrease the chances of accidental or unnecessary bites."

Metropolitan Div., Los Angeles Police Dep't., Canine Unit Manual 19-20. The training exercises in the Canine Manual demonstrate that the dogs are trained not to bite when biting is unnecessary, just as officers are trained not to shoot when it is not appropriate.[3]

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[3]These are the control training exercises:

1. Criminal Apprehension (Running)
The dog shall be placed in a stay facing the decoy. The decoy shall be standing motionless 30 yards away from the dog. Upon direction of the evaluator, the decoy shall break and run away from

the dog. The dog shall remain stationary. When the decoy has run 40 yards, the handler shall send his dog. The dog must apprehend the decoy by catching and biting him hard. The dog must bite and hold the decoy until commanded to "out," upon which the dog must immediately release the decoy and return to his handler's heel.

2. Criminal Apprehension (Stationary)
The dog shall be placed in a stay facing the decoy. The decoy shall be standing stationary facing the dog 50 yards away. Upon command, the dog will apprehend the motionless decoy by biting him hard. The dog must bite and hold the decoy until commanded to "out," upon which the dog shall immediately release the decoy and return to his handler's heel.

3. False Start
The dog shall be placed in

a stay facing the decoy. The decoy shall be facing the dog and standing motionless at a distance of 30 yards. Upon direction of the evaluator, the decoy shall break and run away from the dog for 30 yards. The dog shall remain stationary during this exercise.

4. Call Off (Stationary)
The dog shall be placed in a stay facing the decoy. The decoy shall be standing motionless facing the dog 50 yards away from the dog. Upon direction of the evaluator, the handler will send his dog to apprehend the decoy. When the dog is within 20 yards of the decoy, the handler shall command his dog to "out." The dog must cease all aggression and return to his handler's heel.

5. Call Off (Running)
The dog shall be placed in a stay facing the decoy. The decoy shall be

standing motionless facing the dog at a distance of 30 yards. Upon direction of the evaluator, the decoy shall break and run away from the dog. The dog shall remain stationary. When the decoy has run 40 yards, the handler shall send his dog to apprehend the decoy. When the dog is within 20 yards of the decoy, the handler shall command his dog to "out." The dog must cease all aggression and return to his handler's heel. The decoy must continue running until told to stop by the evaluator.

6. Suspect Hold (Stationary) The dog shall be placed in a stay facing the decoy. The decoy shall be standing motionless facing the dog at a distance of 30 yards from the dog. Upon command, the dog shall run to the decoy and bark continuously at him. The decoy should remain as still as possible. At this time, the evaluator

may direct the decoy to attack the dog, or direct the handler to call his dog to a heel. The handler must remain standing at his original position during the exercise. Any attack by the decoy shall dictate his apprehension by the dog without any influence from the handler. The dog shall bite the decoy hard and hold the bite until commanded to "out." The dog shall then immediately release the decoy and return to his handler's heel.

7. Hold (Running)
The dog shall be placed at a stay facing the decoy. The decoy shall face the dog standing motionless 30 yards from the dog. Upon direction from the evaluator, the decoy shall break and run away from the dog. When the decoy has run approximately 40 yards, the handler shall command his dog to apprehend the decoy. When the dog is within 50

IV

"To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion'." Tennessee v. Garner, 471

---

yards, the decoy shall stop, face the dog, and remain motionless. When the decoy stops, the handler shall command his dog to hold the decoy. The dog must stop within six feet of the decoy and bark at him continuously. The evaluator may then order the decoy to run, attack the dog, or direct the handler to call his dog to a heel. The handler must remain standing at his original position during this exercise.

U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)). In this respect, "reasonableness depends on not only when a seizure is made, but also how it is carried out." Id. (emphasis added). The question we must answer is "whether the totality of the circumstances justified a particular sort of... seizure." Id. at 8-9 (emphasis added).

In my judgment, the totality of the circumstances I have outlined thus far are manifestly "exigent" as that concept has been used by the Supreme Court to justify certain exceptional police practices. See United States v. Santana. 427 U.S. 38, 42-43 (1976) (allowing warrantless entry of a home while in "hot pursuit"). The

circumstances most certainly create probable cause to believe Chew "posed a threat of serious harm to the officers or to others. . . ." Tennessee v. Garner, 471 U.S. at 11. In addition to these integrated facts and circumstances that weigh heavily in this balancing process, I also note the following.

First, a biting dog is not a bullet from a firearm. A trained dog is much less dangerous than a shotgun. See Robinette, 854 F.2d at 912 (concluding the use of a properly trained police dog to apprehend a felony suspect does not constitute the use of deadly force). A police dog can inflict fatal wounds, but experience has shown that this is not a common

event. Id. at 913. By comparison, when police shoot, they must always be prepared to accept the possibility of a fatality. Tennessee v. Garner stands as a witness to this reality. Indeed, while we have expended over eighteen months deciding this case, I have heard oral argument in an appeal involving the shooting by police in San Francisco of a recluse engaged in resisting the service of an administrative inspection warrant.[4] The estate of the accused argued in that case that the police should be liable under 28 U.S.C. 1983 for violating the decedent's rights because they entered the decedent's house with firearms when they should

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[4]Alexander v. City and County of San Francisco, No. 92-16751

have used a "less violent alternative," i.e., police dogs. I quote from their brief:

> "If there eventually arose some compelling reason to seize Mr. Quade, police could have employed a canine unit. The San Francisco Police Department has police dogs that are specially trained to search for and discover persons hiding in buildings.
>
> "Police admit that a canine unit was available and could have been utilized. Appellees' own police expert acknowledged that a dog unit was a viable option and would have involved less chance of injury to Mr.

Quade."

No doubt had Chew been shot, his estate would be arguing in this case that dogs should have been used to apprehend him because, of course, dogs represent a "less violent alternative."

Essentially, I agree with the Sixth Circuit:

> "Indeed, instead of generally causing deadly force to be used to apprehend criminals, we believe that these dogs often can prevent officers from having to resort to, or be subjected to, such force. Any attempt to apprehend a criminal suspect presents the officer with [a] difficult and

frightening situation, but certainly an attempt to arrest a suspect hidden inside an unfamiliar building during the nighttime presents a particularly confusing one. The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of officers, bystanders and the suspect. Robinette, 854 F.2d at 914 (emphasis added). Searches for hiding suspects are very tense occasions where fingers are appropriately, but dangerously,

near triggers. Accidental shootings are not uncommon.

Second, I see a compelling interest in protecting police from death or serious bodily injury at the hands of holed up criminals. The use of properly trained dogs to seize persons like Chew fosters this interest.

Third, before Los Angeles Police Department K-9 Unit police dogs are released, hiding suspects are given this warning: "This is the police. We are going to use a police dog to find you. There is a possibility you will be bitten by the dog. If you surrender now, the dog will not be used. You have one minute." This gives the suspect control over his own fate. See

Tennessee v. Garner, 471 U.S. at 29 (O'Connor, J., dissenting) ("[T]o avoid the use of deadly force . . . , the suspect need merely obey the valid order. . . .").

Fourth, the massive deployment of police officers required to contain someone like Chew depletes their ranks elsewhere during the many hours that it takes to conduct a painstaking search of a scrapyard. Sgt. Yarnell testified that in an era limited resources and severe budgetary constraints, economic concerns were a factor motivating the K-9 program.

Taking these factors into consideration in their totality, and realizing that all Chew had to do to avoid this fate was surrender, the

scales balance easily in favor of the use of police dogs to assist in these types of seizures. I do not believe that the deployment per se of police dogs to find hiding felony suspects is unreasonable. Thus, I agree with the district court that the release of a police dog to apprehend Chew was objectively reasonable as a matter of law. See Graham v. Connor, 490 U.S. 386,396 (1989). If wanted felony suspects normally surrendered and never attacked police officers, I suppose the result in this case might be different, but that is a fanciful world in which we do not live.

I am not persuaded by the majority's attempt to discredit Robinette v. Barnes, which Judge

Reinhardt suggests was wrongly decided. In Robinette the suspect was hidden in a dark building in the nighttime, but the principle active in Robinette is that a suspected felon hiding from the police may be flushed out by a biting police dog without offending the Fourth Amendment. As Sgt. Yarnell testified, "[D]aylight has nothing to do with it." Darkness aggravates the problem, but daylight does not dispel it. I believe Chew and Robinette stand on equal footing in this context: it was objectively reasonable in both instances to use police dogs to apprehend them. The minimal factual differences between these cases are insufficient to require different results.

What should the police have done to make their conduct reasonable? After Tennessee v. Garner, Chew while running could not be stopped with a bullet. He must be allowed to run. This increases the possibility that he will find a place to hide. Then what? Chew obviously was not going to surrender on his own initiative. His own deposition makes this clear. Nightfall was approaching. It is naive to believe Chew was not buying time until darkness became his ally. Should the police have left their dogs in their kennels and conducted a massive dumpster by dumpster search for Chew before it got dark? Is that the reasonable way to conduct this operation? Were the police required to

maintain their perimeter until they starved Chew out? Should the police have given up and gone home? The Fourth Amendment should not require that we send police into the jaws of danger or permit suspected felons to go on their way. Tennessee v. Garner was intended to protect fleeing nondangerous suspects from gunshots, not to allow them to escape or to endanger the suspect's pursuers or the public.

In my view, the enforcement challenge presented by Chew and the challenge presented by Ronald Mendoza are constitutionally indistinguishable. See Mendoza v. Block, ___ F.3d (9th Cir. 1994). We held in Mendoza that releasing a police dog to find a hiding

felon was objectively reasonable, and we should do so here.

V

It is unfortunate police find it necessary to carry guns and use police dogs. My colleagues are correct: Police dogs can inflict considerable damage on human beings. Nothing I say should be taken for a moment to condone the unprofessional, careless, or inappropriate use of police dogs. A jury in this case returned a verdict for Chew because it believed Officer Bunch went over the line when Chew was finally found. So be it. Police dogs must be well trained, and they must be used appropriately. But in situations like this, the risk of dog bites to menaces like Chew is insignificant in

my judgment when compared to the risk posed to police officers forced to go into deathtraps to search for suspected felons. On occasion, officers misuse guns. Sometimes they misuse batons. But I would not therefore render the use per se of guns or batons unreasonable under the Fourth Amendment, only their misuse.

Police dogs are capable of facts beyond the capacity of human beings, primarily because of their remarkable senses, including the sense of smell. In one well- known case, a police dog named Pascha ended a one-man crime wave by a career criminal dubbed the "Balcony Burglar," a burglar who had terrorized the Westside of Los Angeles County for many years. Pascha's widely

publicized contribution to the safety of the community was heralded in many newspaper articles during January, 1980. The following are excerpts from those articles showing the importance of well trained police dogs to law enforcement and the public.

> "Police this morning cornered and arrested a man they believe is the "Balcony Burglar" -- suspected in three murders, 130 burglaries and numerous rapes -- following a dramatic pre-dawn manhunt near Century City.
>
> "The suspect, identified as Harold Holman, 33, of Los Angeles was taken into custody after being sniffed out and attacked by a Santa Monica police dog.

"Police said Holman was captured about 4:30 a.m., when he was found hiding under a triplex at 2103 Benecia Ave.

"Following his capture, Holman was taken to Los Angeles New Hospital for treatment of bites on his arms suffered when the dog "chewed him up." He was taken to the West Los Angeles Division police station for questioning following treatment.

"Holman was booked at the station in connection with a burglary committed less than an hour before his capture.

....

"The sequence of events leading up to this morning's capture of

Holman began when a prowler entered a second-story residence at 2343 Fox Hills Drive about 3:20 a.m. Neighbors summoned police after hearing the woman resident screaming for help. Officers in one of the patrol cars dispatched spotted a man running across Olympic Boulevard near Benecia about three blocks north from the scene of the break-in. Officers then cordoned off an area bounded by Beverly Glen Boulevard, Fox Hills Drive, Olympic and Benecia and began searching for the suspect.

"A police helicopter was called in and used its powerful flood lights to illuminate the

neighborhood while 15 police officers on the ground combed the neighborhood.

"As the search perimeter was sealed off, the West Los Angeles officers called for help from Santa Monica, where two dogs were being used as part of a special stakeout team looking for the burglar who this week had murdered two people and looted numerous apartments in Santa Monica in recent weeks.

"At about 4:15 a.m., West Los Angeles officers received another call, this one from a woman in the search area reporting a prowler climbing her fence and knocking over trash cans.

"The dogs were brought in, and it was Pascha, a German shepherd handled by officer Barney Melekian, who caught the scent and traced the suspect to a crawlspace under the triplex.

"The animal held Holman at bay, growling and biting the suspect several times on the hands and arms before officers took the man into custody.

SMPD Dog Traps Man in WLA Chase, Santa Monica Outlook, Jan. 18, 1980, at A-1, A-8.

"A grateful public also has been sending its own rewards to Pascha this week. At latest count, seven boxes of dog biscuits have arrived at Santa Monica

police headquarters.

"Melekian took all the congratulations in stride, stressing that it was actually the teamwork among the departments that led to the suspect's capture.

"If West L.A. (police) hadn't quickly sealed off the neighborhood where the suspect was spotted, 'we never would have found him,' said Melekian.

"That comment brought this response from a West L.A. officer: 'Without that dog, we probably never would have found him. If we had, it probably wouldn't have been for several more hours and maybe only after a shooting.'"

....

"So we go over there and the dog 'keys' right away. He follows a scent for about 300 yards, over fences, through yards and alleys. He lost it for awhile out on Beverly Glen, then he picked it up again and took us back through a yard (2103 Benecia Ave.) and to this crawlspace opening. Then he just went bananas."

"I called for other officers to surround the house, then we yelled a warning under the house that we're sending the dog in. We didn't get an answer so we pushed in the screen and the dog went under and I went after him."

Melekian said Pascha found the suspect about 20 feet from the

opening. "The guy tried to kick at the dog, and a fight sorta ensued. He was trying to choke the dog, which may be why he got some sore fingers."

....

"Lt. Glen Ackerman of the West L.A. detective bureau said five or six officers nightly had been working stakeouts during their off-duty hours for about six weeks prior to the arrest.

"That meant cruising streets from 1 a.m. to 6 a.m., after already putting in a full day of work.

"'We had a lot of tired detectives when this was over.' Ackerman said. 'The morning of the

capture was an event of great jubilation over the apparent end of this crime pattern.'

"'This was a case where the dog really proved his worth.' Oswald added as he scratched the docile Pascha behind the ears.

"Pascha 'doesn't know this guy was so important.' Melekian said, with Pascha lying at his feet like a 105-pound puppy. 'He was just doing his job, like with the other 70 or 80 guys he's gone after.'

....

"Being a hero is nothing new for Pascha. He received the Police Department's Merit of Valor in 1978 for his efforts to control a robbery suspect who had attacked

an officer."

Mike Tipping, A Parry for Pascha, Santa Monica Outlook, Jan. 26-27, 1980, at A-1, A-4.

> "It was a classic police operation in almost every respect. The LAPD helicopter kept the man pinned down while the patrol cars on the perimeter prevented his escape. All that remained was for Pasha [sic] to come in from Santa Monica to track the man down.
>
> "As it turned out, the suspect had run under my bedroom window to a building two houses down, pulled open the screen cover leading to a crawl space under the house, replaced the screen, and inched his way about 30 feet under the

house.

"It's possible that if Pasha hadn't picked up the scent, somebody might have found him but just about everybody involved said the odds were greater that they wouldn't have found him. Even if they had, considering that he was armed with a .38 pistol, it most likely would have turned out to be a major SWAT operation.

....

"Since he started his career as a police dog, Pasha has assisted in more than 300 felony arrests. He's found about 50 crime suspects who were doing their best not to be found, and he's only bitten 19 of them.

"That's mainly because Melekian does his best to discourage him from chewing up criminals.

"Actually, there's no malice in Pasha. Melekian explains. Biting people is sort of a game, like catching a Frisbee is for other dogs.

"The rules of the game, basically are, that Pasha can't bite anybody unless Melekian orders him to or they try to attack Melekian or another officer, or--and this is the key rule--they try to move after Pasha has sniffed them out.

"If a burglar, for example, is discovered by Pasha hiding in a building, the dog most likely will

simply bark and stand guard, perhaps placing his mouth ever so gently on the suspect's arm. If the suspect stands perfectly still, there's nothing to worry about.

"But one move and Pasha is free to bite. In training, that's a reward and it works the same way in real situations, although Melekian says Pasha never bites any harder than the 'level of resistance' he encounters.

"'Of the 19 people he's bitten, 12 had guns.' Melekian says, 'We train the dogs to go for the arm. If somebody tries to kick him, he'll take the leg. But its a myth that they go for the throat.

The most serious injury he's caused was a broken arm.'"

William Overend, Pasha the Wonder Dog, Force's Finest German Shepherd Gets His Man, L.A. Times, Jan. 31, 1980, 4, at 1,8-9.

As our streets and communities become more dangerous, and as the police come under increasing fire from criminals, it is a tragic mistake for this court to send police dogs to the sidelines in favor of sending in officers to flush out hiding felony suspects like Chew. I repeat Melekian's words: "Of the 19 people [Pasha has] bitten, 12 had guns." The irony in this case is the unstated assumption of the majority that a hiding suspect is in less danger from officers carrying

firearms than from a police dog. This assumption may be far from accurate.

Without police dogs, the police might still be looking for the Balcony Burglar, Ronald Mendoza, or for that matter, Thane Carl Chew himself. Police dogs by themselves certainly won't solve all our problems, but at least they will protect and help keep alive the officers we pay to catch those dangerous criminals who violate our laws. Such protection is hardly unreasonable. I doubt as Judge Reinhardt claims that using police dogs to flush out hiding felony suspects is the "beginning of the police state and the end of freedom." The decision to establish a K-9 Unit to locate hiding suspected felons should be left to the

governmental process. As a matter of policy, the executive and legislative branches of local government can arrive at an informed conclusion, just as they have with the use of guns, tasers, batons, and chokeholds. As in Los Angeles, a police chief, an elected mayor, a police commission, and an elected city council are best positioned to make these decisions and to determine the needs and overall interests of the community.

CHEW v. GATES APPENDIX C

ORDER DENYING PETITION FOR REHEARING
AND REJECTING SUGGESTION FOR REHEARING
EN BANC

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
August 30, 1994
Cathy A. Catterson, Clerk
U. S. Court of Appeals

THANE CARL CHEW,	No. 91-55718
	D.C. No. 89-5204
Plaintiff-Appellant	RG(Tx)
v.	ORDER
DARYL GATES, individually and as Chief of the Los Angeles Police Department; CITY OF LOS ANGELES, a Municipal Corporation and Public Entity of the State of California; and DANIEL BUNCH; DONALD YARNALL; MARK MOORING; PATRICK McKINLEY; DOES 1 through 10, 14, 16 through 20, inclusive, each individually and as a Los Angeles Police Officer,	
Defendants-Appellees.	

Before: NORRIS, REINHARDT, and TROTT, Circuit Judges

Judge Norris has voted to deny appellees' petition for rehearing and recommended rejecting the suggestion for rehearing en banc. Judge Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Trott voted to deny the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CHEW v. GATES APPENDIX D

FEDERAL CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Civil Rights Act of 1871, 42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Acts of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

SUPREME COURT, U.S.
FILED
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(3)

No. 94-980

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CITY OF LOS ANGELES, a Municipal Corporation and Public Entity of the State of California,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT THANE CARL CHEW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a plaintiff sues a police officer and his employing city, alleging that the officer is liable both for using a police dog to attack and bite the plaintiff, and for beating and kicking the plaintiff himself, does the satisfaction of a judgment against the officer preclude an appeal from a summary judgment in favor of the city, where distinct constitutional wrongs were alleged against each defendant, and it cannot be determined from the general verdict whether the jury compensated plaintiff for the dog bites, or simply for the beating by the officer?

2. Can a city's policy of using police dogs to find, attack and bite a suspect every time the dogs get out of sight of their handlers, regardless of whether the suspect poses a threat or is trying to surrender, subject the city to liability for a dog attack, either on the basis of a determination that the seizure was unreasonable and the attack occurred pursuant to the policy, or that the policy itself was unconstitutional?

LIST OF PARTIES

Respondent Thane Carl Chew was plaintiff and appellant in the courts below. Petitioner City of Los Angeles was a defendant and appellee in the courts below. Daryl Gates, Donald Yarnall, Mark Mooring and Patrick McKinley were defendants and appellees in the courts below, where they obtained favorable judgments, and are not parties before this Court. Daniel Bunch was a defendant in the trial court, where a judgment was entered against him which has been satisfied. He was not a party to the appeal below.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CITY OF LOS ANGELES,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

Respondent Thane Carl Chew respectfully submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinions of the court of appeals are reported at 27 F.3d 1432, and are reproduced in Appendices A and B to the petition. The opinion of the district court is reported at 744 F. Supp. 952 (C.D. Cal. 1990).

JURISDICTION

Respondent agrees that this Court has jurisdiction. However, Respondent objects to Petitioner's mis-characterization of the nature of the decisions below, as fully explained hereinafter.

STATEMENT OF THE CASE

This case involves the right of Plaintiff Thane Carl Chew to pursue a claim for damages against the City of Los Angeles for dog bites inflicted on him during his arrest. Plaintiff sued the arresting officer, the City and supervisory personnel under 42 U.S.C. § 1983, alleging the use of excessive force in both the use of the dog, which nearly resulted in the loss of his arm, and an assault by the arresting officer, which resulted in various lacerations to his head. The district court granted summary judgment in favor of the dog trainers and police chief on the grounds of qualified immunity, and in favor the City on plaintiff's *Monell*[1] claim pertaining to the policy regarding the use of dogs on the grounds that the seizure was reasonable as a matter of law. The case then proceeded to trial against the arresting officer alone. Following a general verdict, judgment was entered against the officer in the amount of $13,000, which the City has paid on behalf of the officer. Plaintiff appealed the denial of summary judgment against the City and other defendants. The court of appeals affirmed the summary judgment in favor of the individual defendants, but reversed and remanded for a trial on the City's *Monell* liability.

On September 4, 1988, Chew was stopped by a Los Angeles police officer for a minor traffic violation. CR 39.[2] While the officer was running a "make" on him, Chew fled on foot and hid in a nearby junkyard. Upon learning that

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[1] *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

[2] The facts relating to the incident are taken from the pretrial order, because Petitioner has raised a question which relates to the effect of the jury's verdict following a trial. Since plaintiff appealed a summary judgment in favor of the City, a trial transcript was not ordered. Contrary to what Petitioner charges, it was not plaintiff's responsibility to do so.

there were three outstanding warrants for Chew's arrest, the officer called for assistance.[3] A perimeter was set up around the junkyard, and several canine teams, including Officer Bunch and his dog, as well as a helicopter, were called in to search for Chew. After an extensive search of nearly two hours, Bunch's dog finally located Chew hidden between two dumpsters. At the time, it is undisputed that the dog had been unleashed to find Chew, and was out of sight of his handler. Id.

Plaintiff alleged that when he saw the dog approaching, he called out that he surrendered and to call the dog off. He alleged that he then heard a voice say, "Get 'em," at which point the dog attacked, biting him first in the side, then in the upper arm, and finally in the lower arm, tearing out a huge chunk of flesh and nearly severing the arm. CR 1, 39. Plaintiff further alleged that when Bunch arrived, the officer kicked him in the head and hit him a number of times about the head and body with his baton, opening various cuts in his head. CR 39.

Bunch alleged that when he came upon the plaintiff and the dog who were between the dumpsters, plaintiff was striking the dog with a metal pipe or rod, and that he therefore lowered himself down and kicked at the plaintiff to "disarm" him. Bunch also contended that the various cuts on plaintiff's head were caused by scraps of metal as the dog was attempting to pull Chew from his hiding place. Id. It is

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[3] As noted in the opinion of the Court of Appeal, it is undisputed that at the time the search was conducted, none of the officers was aware of the reason for the warrants, except that they were for "felonies." Appendix A, Petition for Writ of Certiorari (Pet. App.A) at A57. Defendants conceded this was the case in their brief in the Court of Appeal and at oral argument. Thus, Petitioner's belated attempt to enhance the record by reciting that the warrants were for "burglary" is unavailing.

undisputed that Chew sustained severe lacerations to his left side and left forearm, and lacerations to his head.

Plaintiff sued Los Angeles police officer Daniel Bunch, Police Chief Daryl Gates, Captain Patrick McKinley, Sergeant Mark Mooring and Officer Donald Yarnall for damages resulting from the use of excessive force during his arrest. Bunch's liability was predicated both on his use of a police dog to attack and bite Chew, and upon his kicking Chew in the head and beating him with his baton. CR 1. The liability of the other individual defendants was predicated upon their responsibility for training the dogs to always attack and bite even non-resistant, passive suspects who were trying to surrender, and the City's liability was premised on its implementation of the training policy. Id. Plaintiff's first amended complaint alleged that the City's policy makers had promulgated and implemented a policy which

> Required, encouraged or condoned the training of police dogs to attack and bite unarmed, non-resistant human suspects, knowing that severe injury to said suspects was likely to occur as a result thereof, and knowing that the dogs could be trained so that they would not bite citizens who were offering no resistance or harm.

CR 1, para. 18(b).

Beginning in about 1983, LAPD dogs, including the one that attacked plaintiff, had been trained to "find and bark," i.e., to alert the handler by barking when they found a suspect, but not to automatically bite. This method was thought to be safer for the handler. Mooring Deposition at 44-47;[4] Yarnall Deposition at 97. That policy was

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[4] While McKinley stated that "find and bite" was "safer" for the

abandoned in late 1987 or early 1988 in the face of arguments that the dog needed a "reward" to enforce its hunt instinct, the reward being the "fight" or "bite," and arguments that since the dog would bite if the suspect moved at all, then the City was likely to be sued anyway. Mooring Deposition at 59-66; McKinley Deposition at 43-48. Under the new policy, the desired goal was to have the handler stay close to the dog, but in "many, many cases" the dogs *would* get out of sight of their handlers, and it was impossible to instruct the handlers *not* to let the dogs get out of their sight. Mooring Deposition at 64. If a dog was sent out to find a suspect and did get out of sight of its handler, upon finding the suspect the dog was trained to *attack, bite hard, hold and even drag the suspect to the handler, unless earlier called off*, even if the suspect was stationary, passive and offered no resistance. Yarnall Deposition at 60-61; Mooring Deposition at 43-44; Bunch Deposition at 26-27.[5]

All defendants except Bunch moved for summary judgment, arguing that the policy of using dogs to "find and seize felony suspects who refuse to surrender" was "not clearly unconstitutional." CR 9. The defendants conceded, for purposes of summary judgment, that departmental canine

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"community," that depended upon the officer being "very close" to the animal so that he could control it, and he agreed that this method was in fact more dangerous for the *officer*. McKinley Deposition at 36, 39; See Pet. at 36-38. McKinley Deposition at 36. In this case, Bunch was nowhere near his dog when it located plaintiff.

[5] McKinley's testimony, cited by Petitioner, that the dogs were trained *not* to bite under these circumstances is flatly contradicted by the trainers and the handler themselves. It also contradicts his own testimony that the dog needs the reward of a bite to be effective. See Pet. at 39. Petitioner's reference to Mooring's testimony indicating that a dog would not necessarily bite *every time* it found a suspect is irrelevant, since it is only the situations where the dog is *out of sight of the handler* that was involved in this case. See Pet. at 31.

policy authorized the seizure of all concealed suspects, whether they resisted or not, by dogs trained to bite hard and hold, and that Chew was indeed attempting to "peacefully surrender once he realized he was found." CR 16. Defendants' memorandum of points and authorities in support of the motion stated that "Volker found the suspect and seized [plaintiff], as he was trained to do." CR 9.

In an opinion and order entered August 31, 1990, the district court granted summary judgment for all defendants except Bunch, holding that the individuals with responsibility for the dogs' training had qualified immunity, and that the City could not be liable because the seizure by the dog was objectively "reasonable" as a matter of law. CR 25; 744 F. Supp at 956.[6]

The court of appeals first held that Chew's claims were not moot because the three constitutional wrongs which had been alleged against Bunch (releasing the dog, ordering the dog to attack plaintiff after he attempted to surrender, and beating and kicking plaintiff as the dog was biting him) were distinct from those alleged against the other defendants, including the City (training and using police dogs in an unconstitutional manner). Pet. App.A at A23-A25. The court further held that Chew could obtain some form of relief on his claims against the City, first because nominal damages are available to him, and second because, in view of the fact that a general verdict was rendered, it could not be ascertained with any assurance that Chew had been compensated for the dog bites, and thus, for purposes of collateral estoppel, it had to be presumed that he was not. Pet App.A at A25-A31.

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[6] While the motion itself appears to argue that all defendants, including the City, were entitled to qualified immunity because the policy was "not clearly unconstitutional," the district court addressed the City's liability in terms of whether the seizure was reasonable, and thus whether a constitutional violation had occurred.

The court also held that it was legally possible to assume that the jury found Bunch not liable for the dog bites and at the same time to hold the remaining defendants liable for them. This challenge, the court held, was "easily met," because the jury could have concluded that it was reasonable for Bunch to release his dog, given the fact that the procedures adopted by the City left him with no other means of apprehending the suspect that involved less risk of bodily injury to himself or the suspect, and still find the City liable for implementing an unconstitutional policy, or for failure to train or supervise properly.[7] Pet. App.A at A31-A35. Moreover, the court noted, *the jury may have exonerated Bunch from liability for the dog bites on the grounds of qualified immunity, a defense which does not apply to the City.*[8] Pet. App.A at 34-35. Thus, the court concluded that the satisfaction of the judgment against Bunch did not bar Chew from pursuing his claims against the City.

As to the merits of the appeal of the summary judgment for the City, the court noted first that Chew had advanced two distinct theories of *Monell* liability:

> First, he contends that Officer Bunch violated his Fourth Amendment right not to be subjected to the use of excessive force by unreasonably releasing Volker and that *Bunch's action was caused by a City policy,*

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[7] Indeed, Bunch contended at trial that he acted reasonably because he acted in conformity with his training and followed policy. The pretrial conference order poses one of the factual issues to be tried as "Whether defendant Officer Bunch reasonable [sic] believed that his use of the dog Volker in this case was in keeping with his training and thus reasonable and lawful." CR 39.

[8] As the trial court noted, Bunch would *not* be entitled to qualified immunity for either intentionally siccing the dog on Chew or for beating and kicking him while he was trying to surrender.

> *custom, or usage.* Second, he argues that regardless of the reasonableness of Officer Bunch's action in releasing the dog (given the alternatives then available to him), *the city's policy of training dogs such as Volker to apprehend unarmed and non-resistant suspects by biting, mauling, and seizing them was itself unreasonable and unconstitutional.*

Pet. App.A at A38-A39.[9] As the court of appeals noted, "[t]he district court held that the city was not liable under either theory for the bites inflicted by Volker because 'the manner in which the police dog was used did not, under the circumstances, infringe on his constitutional rights.' 744 F. Supp. at 956." Pet. App.A at A39. Accordingly, the court stated:

> Initially, we must determine whether the district court correctly concluded that Chew suffered no constitutional injury. Under Chew's first theory of municipal liability, whether a constitutional wrong was committed depends upon an assessment of the objective facts and circumstances bearing on the reasonableness of Officer Bunch's decision to release Volker. *The existence of a constitutional injury under Chew's second theory is not dependent on the lawfulness of Officer Bunch's conduct, but instead turns on the reasonableness of the city's general policy of training dogs to bite and seize all suspects.*

Pet. App.A at A40 [emphasis added].

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[9] The opinion reproduced in petitioner's appendix omits some of the foregoing passage. *See* Pet. App.A at A38-A39.

The court then went on to analyze the reasonableness of the seizure under *Graham v. Connor*, 490 U.S. 386 (1989). Weighing the factors articulated in *Graham* relating to the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight, and noting that the propriety of a particular use of force is generally an issue for the jury, the court concluded:

> When all disputes of fact are resolved in Chew's favor, as they must be for purposes of summary judgment, it is apparent that application of the *Graham* factors would *not* have *required* a rational jury to decide that using Volker to apprehend him was reasonable. Moreover, the district court's decision to take the excessive force question away from the jury conflicts with circuit law.

Pet. App.A at A46 [emphasis in original].[10] ***This holding has not been challenged in this petition.***

The court next found it necessary to consider whether the trial court's grant of summary judgment for the City could be affirmed on the ground that Chew's injuries did not result from the application or enforcement of an official city policy, as urged by the City, even though that issue was not addressed by the trial court. Pet. App.A at A63-A64. On this issue, the court held

> There is little doubt that a trier of fact could find that Chew's injury was caused by city

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[10] The reproduction of the opinion in petitioner's appendix omits the emphasis used by the court in its published opinion.

> policy. In the district court, the city conceded, for purposes of summary judgment, the truth of Chew's contention that departmental policy authorized seizure of *all* concealed suspects -- resistant or nonresistant, armed or unarmed, violent or nonviolent -- by dogs trained to bite hard and hold. Construing city policy as the appellee conceded we must, it doubtless could be found to be the "moving force" behind Chew's injury. Bunch released Volker because his superiors instructed him that he was to do so under the circumstances of Chew's case. The instructions are based on what we assume to be city policy. Accordingly, we must reverse the district court's grant of summary judgment in favor of the City of Los Angeles.

Pet. App.A at A66-A68 [footnote omitted]. ***The City does not take issue with this holding either.***

The court next concluded that, *accepting the City's argument that no jury could find that departmental canine policy was officially sanctioned*, liability could be found under the "deliberate indifference" formulation of *City of Canton v. Harris*, 489 U.S. 378, 388 (1989):

> In order to accept the city's contention that departmental canine policy was not officially sanctioned, we would have to find that the city itself had no policy regarding the use of canine force, or, at best, a policy of vesting complete discretion regarding the use of canines in the dogs' handlers. The record contains evidence that the dogs bit suspects in over 40% of the instances in which they were used. Where the city equips its police officers with potentially

> dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a municipal policy governing their use, evidences a "deliberate indifference" to constitutional rights. Under such circumstances, a jury could, and should, find that Chew's injury was caused by the city's failure to engage in any oversight whatsoever of an important departmental practice involving the sue of force.

Pet. App.A at A70-A72.

Finally, the court held that on remand, a jury could find that although the officer's on-the-scene decision to use canine force was reasonable under the circumstances, the City was nevertheless at fault for providing its officers with dogs trained to bite and seize all concealed suspects regardless of their efforts to surrender. Thus, if plaintiff could prove that training in less dangerous means of detection and apprehension was both feasible and effective, as the court noted the City's recent reversion to the "find and bark" policy suggests might have been the case, then the City's failure to so train its dogs "may well have constituted and unreasonable municipal action regarding the use of force." Pet. App.A at A72-A74.

REASONS FOR DENYING THE WRIT

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE MONELL ISSUE PRESENTED IN THE PETITION.

The petition seriously distorts the nature of the rulings below and the issues that were decided. The City states that the court of appeals "reversed a Summary Judgment in which

the [district court] had concluded that the City of Los Angeles' determination to employ police dogs to apprehend hiding suspects in built up areas, by seizing and biting if necessary, did not implicate the city's Monell liability." The district court determined no such thing. The motion for summary judgment raised, at best, only *one* issue concerning *Monell* liability: that the policy of using dogs to search for and seize felony suspects was "not clearly unconstitutional."[11] As pointed out by the court of appeals, the district court never reached *any Monell* issue, since it determined that there was no constitutional violation. On appeal, the defendants never even attempted to defend the district court's holding. Instead, the City raised all new theories as to *Monell* liability, arguing 1) that the constitutional violation was not *caused* by the City's policy, because it was an isolated incident for which the City could not be liable; 2) that there was "no evidence" of a policy that reflected a deliberate indifference to constitutional rights; 3) that the policy alleged in the complaint was not "policy" at all because it was not promulgated by an official "policy maker;" and 4) that the policy alleged was not the "practice" adopted in reality. *See* Appellees' Brief at i-ii.[12] The court of appeals deemed it necessary to address the issue of whether a jury could find that the policy *caused* the violation, and decided that it could. **That holding has not been**

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[11] In fact, the motion arguably did not even raise a *Monell* issue. It depends instead upon the argument that the defendants, including the City, were entitled to qualified immunity. The motion concludes with the statement, "This Motion . . . was brought on behalf of Daryl Gates, the City of Los Angeles, and Does 1 through 20 on the ground that the K-9 policy of the Los Angeles Police Department was not clearly unconstitutional, in good faith [sic] and consequently entitled to qualified immunity."

[12] The entire argument regarding the *Monell* issue raised here occupied barely more than a single page in the City's brief in the Court of Appeal. *See* Appellees' Brief at 32-33.

challenged here.

The City argues here only that the training of the dogs and their handlers is so careful and extensive that it cannot possibly be considered "deliberately indifferent." But the court of appeal never said that it could be. Indeed, the only mention of the "deliberately indifferent" standard in the opinion of the court below was in response to the *City's* attempt to disavow the concession it made in the trial court and argue that there was *no* policy regarding the use of dogs.[13] The court below concluded that the *lack* of any policy at all regarding the use of canine force *would* show deliberate indifference. But the City *did* concede that the training of its dogs was policy, and that concession is binding on the City. Therefore the issue of deliberate indifference was not essential to the court's decision, and there is not a sufficient presentation of the issue to warrant this Court's review.

The record also is inadequate for review of this issue. Because the issue was never raised in the trial court, no evidence was adduced with respect thereto, the trial court never considered any arguments with respect to this issue, and the record is not fully developed.

II. THE PETITIONER'S MONELL ARGUMENT HAS NO MERIT WITHOUT REGARD TO THE DECISION BELOW.

The City is simply wrong when it argues that this case turns on whether the City's training policy was "defective" or "insufficient." Plaintiff never claimed that the dogs were not *thoroughly* trained. Instead, plaintiff alleged that a policy

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[13] The City also persists, in this court, in mis-characterizing what the policy was, despite the concession made in the district court.

promulgated and implemented by the City resulted *directly* in a constitutional violation, *because* the dog and its handler acted *exactly* as trained. Thus *City of Canton v. Harris* has no application to the facts of this case. This is a straight *Monell* claim, where the policy is alleged to be the moving force behind the violation. *Monell* does not require a showing of deliberate indifference.

Furthermore, the court of appeals determined that the policy in this case could have been considered unconstitutional *on its face*, unlike the policy in *Harris*. If dogs which are capable of mauling human beings are trained to bite even non-resisting, non-dangerous suspects who pose no threat to the officer or others, then surely such a policy "implicates" the City's liability, just as would a policy which allowed police officers to use deadly force to apprehend fleeing suspects who pose no immediate threat to the safety of the officer or others. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

III. THERE IS NO CONFLICT BETWEEN CIRCUITS WITH RESPECT TO THE QUESTION PRESENTED.

Petitioner attempts to create a conflict between this case and *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988). To begin with, the holding in *Robinette* has no bearing whatsoever on the question presented. In that rather unusual case, the Sixth Circuit held that a seizure by a police dog, which bit and killed a suspect caught in the act of committing a burglary in an enclosed building, at night, after he refused to come out despite warnings that a dog would be sent in, was not unconstitutional. Regardless of the soundness of that holding, Petitioner has not challenged the holding in *this* case that genuine issues of fact remain to be tried regarding the reasonableness of the seizure. The question of *Monell* liability, and especially the species of *Monell* addressed in the

petition, was simply not addressed in *Robinette*. Thus the "posture" of the Ninth Circuit, as presented in this petition, is simply not in conflict with *Robinette* at all.[14] If anything, *Robinette* is perfectly *consistent* with the decision in this case as it relates to the individuals who were entitled qualified immunity, and in fact it was the main authority relied upon by the court in holding that the officers were immune.

The facts of *Robinette* are also completely distinguishable from the instant case. *Robinette* occurred at nighttime, in an enclosed building, while a burglary was in progress. The court found *probable cause* to believe the suspect was a serious threat to the safety of the officers. By contrast, the search here took place in broad daylight, in a relatively open space, where at most it was known that there were outstanding warrants for Chew. As the court below noted, it was not known at the time what the warrants were for. The only "crime" in progress at the time was "resisting arrest," a misdemeanor.[15] There was also no reason to believe Chew posed any threat to the officers.

In any event, the "holding" which the defendants claim the decision in this case "rejects" is not a "holding" at all, but some unsupported *dicta* by the *Robinette* court. The statement which the defendants contend should have been

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[14] The City erroneously states that the majority "appear to reject" the decision in *Robinette*. Pet. at 48. The majority in this case did not do so — at least not the majority as the City defines it, i.e. Judges Reinhardt and Norris, who voted to reverse summary judgment. Rather, it was the majority of judges who voted to *affirm* the qualified immunity determination, Judges Reinhardt and Trott, who stated that it was doubtful that the court would have decided *Robinette* the same way. Pet. App.A at A81-A82.

[15] As the panel noted, Chew cannot be properly considered to have been "actively resisting" arrest in any event simply by hiding.

adhered to by the court in this case is:

> Indeed, instead of generally causing deadly force to be used to apprehend criminals, we believe that these dogs often help prevent officers from having to resort to, or be subjected to, such force. . . The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect.

Robinette at 914.

From aught that appears in the opinion, there was no evidence in *Robinette* to support this "finding." There is certainly no evidence in *this* case to support such a dubious proposition. In fact, the City cannot point to one scintilla of empirical evidence from *any* source which supports such a finding. Indeed, common sense and the experience of canine handlers themselves show quite the opposite often occurs.

The whole notion that using a dog to bite improves officer safety results from the myth that dogs are effective against *armed* suspects. They are not. Nor can dogs discern the difference between dangerous and non-dangerous suspects. Dogs have no ability to reason. They have no judgment. They have no ability to understand what a criminal is, what a weapon is, or how dangerous a situation is, and any experienced dog trainer will concede these facts. It is for precisely these reasons that using dogs to bite hard and hold when they find a suspect, unless given a countermanding order, is likely to *increase* rather than decrease the risk to both officer and suspect, and even to innocent bystanders.

It is also untrue that *Robinette* was the "seminal

Section 1983 canine case" until now. In a case which *did* directly involve municipal liability, the Eleventh Circuit decided in *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989), that the trial court had improperly granted judgement n.o.v. in favor of the city and its former police chief, in a case involving the constitutionality of the use of police dogs. That case squarely implicated the constitutionality of the use of police dogs under *Monell* principles and *is* perfectly consistent with this case.

IV. THE MONELL QUESTION RAISES ONLY QUESTIONS OF FACT WHICH ARE UNIQUE TO THIS CASE AND DOES NOT INVOLVE A QUESTION OF NATIONAL IMPORTANCE.

The City argues that certain selected testimony establishes that the court of appeals erred in holding that there was sufficient evidence from which a jury could conclude that the City was liable. The City ignores the fact that a court reviewing an order granting summary judgment must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. At best, the City has shown that there were disputed issues of fact, which in and of itself is sufficient to defeat a motion for summary judgment.

In addition, contrary to what the City alleges, this case does not "challeng[e] the use of police dogs." It involves a very narrowly-defined policy regarding the use of dogs trained to attack and bite even unarmed, non-resistant human suspects who pose no immediate threat to the officer, whenever the dogs get out of sight of their handlers. This is not only a very fact-specific case, but a finding that an unconstitutional seizure resulted from such a policy would *not*, despite Petitioner's rhetoric, mandate the dismantling of all canine units in this country. Such contentions are pure

hyperbole. As shown in the opinion of the court of appeals, the experience of the City of Los Angeles itself belies such an assertion. Prior to the decision below, the City apparently had already returned to a "find and bark" policy, with no apparent upsurge in injuries to the police as a result. In all likelihood, the change has also resulted in a significant *decrease* in injuries to officers and suspects alike.

The Petitioner never explains why the issue raised herein is supposedly of "overriding national importance." Pet. at 42. While the general practice of using police dogs *might,* under certain circumstances, conceivably be considered a question of national importance, that is not the issue in this case. That practice *per se* is not challenged, and is not threatened in the least by the decision herein. All that the court below decided was that the reasonableness of the particular use of force in this case was for the jury to decide, as was the question of whether the policy in question caused the violation — hardly startling propositions, and certainly not so novel as to warrant review by this Court.

V. THE SATISFACTION OF THE JUDGMENT AGAINST THE OFFICER DOES NOT BAR THE MONELL CLAIM.

The Petitioner mis-states both the law and the facts in claiming that the satisfaction of the judgment by the City forecloses plaintiff from further relief. Contrary to what Petitioner claims, plaintiff did not sue the City and the officer for the "same underlying incident." Pet. at ii. He sued each for *separate and distinct constitutional wrongs.* As the court of appeals held, Bunch's liability could have been based either on his use of the dog, whether pursuant to policy or not, or on his attack on plaintiff with his feet and baton. The City could only have been liable for the dog bites, and only on the basis of the policy. It is most emphatically untrue that there was "only one controversy here," i.e. the release of the

dog. Whether the release of the dog was the "central focus" or not, there was clearly a controversy at trial over whether Bunch caused "various cuts" to plaintiff's head by kicking him and striking him with the baton "a number of times." CR 39. The pretrial order sets forth distinct issues of fact and law to be resolved regarding whether the dog attack was unreasonable and whether Bunch's own use of force was unreasonable. It is patently false for the City to assert that there was only a single "kick" upon which the jury could have based its verdict if it was not based on the dog bites. Pet. at 55. Such an assertion is refuted by the very pretrial order the City signed. CR 39.

Nor is it true that plaintiff was the "presumed recipient of a judgment for all damages under Section 1983." Pet. at 53. This statement is contrary to the law as applied by the court of appeals which states just the *opposite*, i.e. that it must be presumed, for collateral estoppel purposes, that plaintiff was *not* compensated for the dog bites. Pet. App.A at A30-A31. As shown by the court below, the *City* has the burden of showing issue preclusion. *Id.* at A28-A29. The plaintiff does not have the burden of proving that the doctrine does not apply. Petitioner has cited no law to the contrary, but nevertheless claims it is "unfair" *not* to put the burden on plaintiff "to establish the basis for his judgment." Petitioner cites absolutely no authority why that should be the rule, or which casts any doubt on the long-settled rule applied by the court of appeal. Since this issue involves, therefore, only well settled principles of law, which were correctly decided, there is no reason for the Court to undertake review.

The City's criticism of plaintiff for failing to seek "clarification" of the basis of liability in the district court is entirely misplaced. Plaintiff appealed a grant of summary judgment; it was the City that raised the issue of collateral estoppel. If anyone knew the issue was going to arise, therefore, it surely would have been the City (which was

represented by the same counsel as Bunch). The onus was on the attorney representing both the City and Bunch to request a special verdict which clearly distinguished between the different bases of liability affecting each of his clients.[16] It was certainly not plaintiff's responsibility to do so. Even further afield is the contention that plaintiff should have ordered the trial transcript. If defendants wished to raise the preclusive effect of the judgment against Bunch as a bar to the appeal, it was surely within their ability to order a transcript and make it part of the record on appeal. They chose not to do so.

It is by no means clear, as the City asserts, that the plaintiff was in fact compensated for *all* his damages. Contrary to what the City asserts, that is *not* what the jury was instructed to do. Rather, it was told that it "may award him only such damages as will reasonably compensate him for such injury and damages as you find, from a preponderance of the evidence in the case, that he has suffered as a proximate result of the accident [sic]." CR 68, Instruction No. 47. What resulted from the "accident" could clearly be either the dog attack or the attack by Bunch. At this point it is simply impossible to determine which the jury had in mind (or even whether all jurors based their verdict on the same acts).

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[16] The City did, in fact, request a special verdict, but it asked only 1) "Did plaintiff have a constitutional right that was violated," 2) "Did Officer Bunch act reasonably, as a reasonable officer on the scene would, and faced with the same circumstances as he was," and 3) "Did Officer Bunch deliberately order his dog to attack or personally assault the plaintiff with full knowledge
that it was unnecessary." CR 48. The form was not used, probably because it did not incorporate the correct legal principles, but it is apparent that if it had been used, an affirmative answer to the last question would have served only to inextricably confound the two possible bases for liability.

The City's *assumption* that the jury could not have awarded $13,000 damages for a "kick in the head" is totally unwarranted. There were clearly both multiple kicks and blows from the baton which could have provided the basis for the jury's award. In fact, it makes much more sense to conclude that in awarding so little, the jury did in fact award solely for the kicks and blows and resulting cuts on the head. The evidence clearly showed that the plaintiff's arm was nearly severed. Surely, if the jury had warded damages for such an injury, it would have awarded much more than $13,000.

VI. THIS CASE IS NOT APPROPRIATE FOR RESOLVING THE QUESTION OF WHEN CLAIM PRECLUSION WOULD BAR A MONELL CLAIM.

The City attempts to portray this case as one which is appropriate for the Court to determine "when and under what circumstances a potential *Monell* cause of action will be barred by the satisfaction of the judgment in the underlying individual Section 1983 action." Petition at 55-56. Even assuming the question were of sufficient import, there clearly is no reason for the Court to undertake review of *this* case, with its unique circumstances, in order to set out general rules regarding when such satisfaction of judgments would bar *Monell* actions. On the one hand, it is clear that in the class of cases which the City describes, and in which it incorrectly places this particular case, there is no reason for a Supreme Court pronouncement on the issue. It is an exceedingly simple issue. If the plaintiff is compensated for all his injuries, then obviously there is no reason to proceed against the City or any other entity on *any* claim arising out of the same injury. On the other hand, if a case presents unique circumstances, as does this case, such that a claim against one defendant is not barred by the satisfaction of the judgment against the other, then surely it is not a proper forum for

announcing any general rules.

A pronouncement such as the City seeks is not necessary for resolution of this case, and would necessarily be based on theoretical situations not presented here. Furthermore, the decision by the court of appeals in this case was manifestly *correct,* thereby foreclosing any need for this Court to review that decision. All in all, the city never explains why this is a question of national importance which cries out for resolution by this Court.

The city also attempts to persuade this Court to review this case by describing the district court case upon which the city relies as "controversial." *See Sanchez v. City of Riverside*, 596 F. Supp. 193 (C.D. Cal. 1984). Pet. at 56. What the City does not point out is that *Sanchez* was all but disapproved by the Ninth Circuit in *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991). In *Larez*, as here, the court determined that the plaintiff could proceed to trial against the remaining defendants, because the basis of their liability was different from that of the officer on behalf of whom the judgment had already been satisfied. Unlike this case, however, in *Larez* the plaintiff was only entitled to nominal damages. Here, as the court below concluded, *actual* damages are available as well. Even if sound, *Sanchez* is easily distinguished because in that case there was only one injury alleged. That is clearly not the case here.

CONCLUSION

The questions presented by the City for resolution by this Court do not fairly reflect what was considered by the district court and the court of appeals below and are not questions of such national importance as to require resolution by this Court. There is no conflict in the circuits with respect to the *Monell* issue, which is not adequately raised by the decision below or by the record. The issues presented, to the

extent they were considered by the court below, were manifestly correctly decided and are limited to the facts of this case. Therefore, the Court should deny the Petition for Writ of Certiorari.

Dated: January 20, 1995

Respectfully submitted,
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